ONS

:

USE AND

T.
AND OCCUPATION.
LE VALUE.
LE RENT.

CLAUSUM FREGIT.
MESNE PROFITS.

ON

S.H. 1826

A

TREATISE

ON

THE LAW OF ACTIONS

RELATING TO

REAL PROPERTY:

COMPRISING THE FOLLOWING TITLES,

1. REAL ACTIONS.
2. ACTIONS ON THE CASE FOR NUISANCE AND DISTURBANCE.
3. ACTION ON THE CASE IN THE NATURE OF WASTE.
4. ACTION ON THE CASE FOR DILAPIDATIONS.
5. ACTION ON THE CASE FOR SLANDER OF TITLE.
6. ASSUMPSIT ON THE SALE OF REAL PROPERTY.
7. ASSUMPSIT FOR USE AND OCCUPATION.
8. COVENANT.
9. DEBT FOR RENT.
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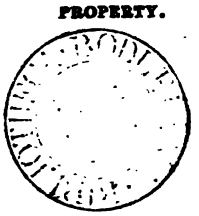
11. DEBT FOR DOUBLE VALUE.
12. DEBT FOR DOUBLE RENT.
13. EJECTMENT.
14. REPLEVIN.
15. TRESPASS QUARE CLAUSUM FREGIT.
16. TRESPASS FOR MESNE PROFITS.



IN TWO VOLUMES.

VOL. I.

By HENRY ROSCOE, Esq.

OF THE INNER TEMPLE.

LONDON:

JOSEPH BUTTERWORTH AND SON

43, FLEET-STREET.

1825.

J. M'Creery, Tooks Court,
Chancery Lane, London.

ADVERTISEMENT.

THE number and importance of the Actions in which the title to Real Property is brought, either directly or incidentally, into question, together with the want of a Treatise devoted to a subject so useful and so extensive, will perhaps be thought a sufficient apology for the present publication. It will not, it is hoped, be deemed injudicious, that the doctrine of Real Actions has been treated at considerable length; for, however much these ancient modes of proceeding may have fallen into disuse, yet, as they still occasionally occur in our Courts, to dismiss them with a slight and cursory notice seemed improper. To those also who are desirous of studying the grounds and principles upon which the great system of our Real Property law is founded, and which may frequently be traced to their origin in the various forms of Real Actions, this portion of the work will not perhaps be found altogether without value. In pursuing so intricate a branch of the Law many difficulties arose, which may be urged as an excuse for the inaccuracies that may be observable in the following pages.

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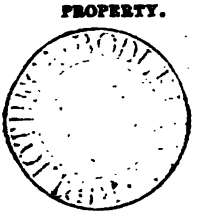

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A TREATISE,

&c.

Of the Division of Real Actions.

REAL actions are of various kinds according to the nature of the thing sought to be recovered, and of the title of the demandant or plaintiff. With regard to the nature of the thing to be recovered, they are divided into actions strictly *real*, in which *land* or *rent* only is demanded; and into actions *in the realty*, in which land is not demanded, but something is to be recovered which relates to land or savours of the realty. (*a*) Of the first kind, are writs of right and of formedon, &c. Of the second, a writ of *quod permittat*, to have common or to abate a nuisance to real property, a writ of *quo jure* for a person who has the fee in lands against another who claims a right of common in his property, &c. There is a third class of actions, which in strict parlance are mixed and not real actions; since not only land but damages also may be recovered in them; such are assize, dower *unde nihil habet*, most of the writs of entry, *warrantia chartæ*, *quare impedit*, and many more, in which damages are recoverable either at common law or by statute. In ordinary acceptation, however, all the actions comprised in these three divisions, are termed real actions. (*b*)

There is also another mode of classification arising out of the *form of the writ*, as it is affected by the nature of the thing to be recovered, and real actions are thus divided into the *præcipe quod reddat*, the *præcipe quod permittat*, the *præcipe quod faciat*, (*c*) and the *pone* or *si fecerit te securum*. Of the first kind, are those actions in which at common law land alone was

Several kinds of præcipe.

(*a*) Litt. s. 492. Co. Litt. 285, a.
(*b*) Co. Litt. 285, b.
(*c*) Co. Litt. 139, b.

demanded, as a writ of right, a writ of entry, &c.; and in which the tenant or defendant is commanded to render the land to the demandant or plaintiff. Of the second species, are those actions in which no land being in demand the defendant is not commanded to *render* any thing, but is directed to *do* some act which may restore the plaintiff to his right. To the third class, belong those writs which neither command the defendant to *render* land, or to *do* any act, but to permit the plaintiff to exercise his right; thus, in a *quare impedit*, the defendant is commanded to suffer the plaintiff to present his clerk, *præcipe* A. *quod juste*, &c. *permittat* B. *præsentare idoneam personam*, &c. Writs of the last species command the sheriff, *if the plaintiff shall make him secure*, &c., to *put by gages and safe pledges, the defendant;* or in other words, to attach him. To this class belongs the assize of novel disseisin.

Droitural or possessory.

Another division of real actions arises out of the nature of the demandant's title, and they are thus divided into actions *droitural*, or those in which the demandant sues in respect of his *mere* right, having lost his right of possession, and into actions *possessory*, or those in which, not being put to his mere right, he sues in respect of his right of possession; and these divisions are again subdivided into writs *droitural*, brought upon the demandant's own seisin; and *writs ancestral droitural*, where the demandant claims in respect of a *mere right* which has descended to him from his ancestor; so also into writs *possessory*, brought upon the demandant's own possession; and writs *ancestral possessory*, when he derives from his ancestor a right *to the possession*. (*a*)

(*a*) Markal's case, 6 Rep. 3. b.

The following table exhibits a view of the various species of real actions.

REAL ACTIONS ARE,

I. DROITURAL OR WRITS OF RIGHT.

- Properly so called.
  1. Right patent.
  2. Right *quia dominus remisit curiam.*
  3. Right *in capite.*
  4. Right in London.
  5. Right close.
  6. Right *de rationabili parte.*
  7. Right of advowson.
  8. Right of dower.
- In the Nature of a Writ of Right.
  1. Right upon disclaimer.
  2. *De rationabilibus divisis.*
  3. Right of ward.
  4. *De consuetudinibus et servitiis.*
  5. *Cessavit.*
  6. Escheat.
  7. *Nativo habendo.*
  8. *Quo jure.*
  9. *Secta ad molendinum.*
  10. *Ne injuste vexes.*
  11. Writ of *mesne.*
  12. Dower *unde nihil habet.*
  13. *Quod permittat.*
  14. Formedon.
      - In descender.
      - In remainder.
      - In reverter.

II. POSSESSORY.

- Writs of Assize.
  1. *Novel disseisin.*
  2. Nuisance.
  3. *Darrein presentment.*
  4. *Juris utrum.*
  5. *Mortd'ancestor.*
- Writs of Entry.
  1. *Sur disseisin.*
  2. *Sur intrusion.*
  3. *Sur alienation.*
     - 1. By person incapable.
       1. *Dum fuit non compos mentis.*
       2. *Dum fuit infra ætatem.*
       3. *Dum fuit in prisona.*
     - 2. By particular tenant.
       1. *Ad communem legem.*
       2. By stat.
          1. *In casu proviso.*
          2. *In consimili casu.*
     - 3. By husband seized *jure uxoris.*
       1. *Cui in vita.*
       2. *Sur cui in vita.*
       3. *Cui ante divortium.*
       4. *Sur cui ante divortium.*
     - 4. By ecclesiastic. *Sine assensu capituli.*
  4. *Sur abatement.*
  5. *Quare ejecit infra terminum.*
  6. *Ad terminum qui præteriit.*
  7. *Causa matrimonii prælocuti.*
- Writs Ancestral Possessory.
  1. *Aiel.*
  2. *Besaiel.*
  3. *Tresaiel.*
  4. *Cosinage.*
  5. *Nuper obiit.*
- *Quare impedit.*
- Waste.

To these may be added certain actions which cannot properly be classed in the foregoing table, such are,

Partition.
Deceit.
Quod ei deforceat.
Warrantia chartæ.
Curia claudenda.
Per quæ servitia.

It may be observed, that the foregoing table, which, with a few additions and alterations, is founded on that given by Chief Baron Comyns (*a*), presents only an imperfect view of one mode of classifying real actions, by dividing them into actions *droitural*, and actions *possessory*. The distinction between actions ancestral, and those which are brought on the demandant's own seisin is not noticed, except in that class of writs which are denominated actions ancestral possessory, and which cannot be brought on the demandant's own possession.

Election of Remedy.

In selecting the proper remedy for an injury to real property, it is prudent not to bring an action of too high a nature, which may cause great trouble and delay, and, in some cases, defeat the party of his remedy altogether. (*b*) Thus, if a disseisor within age alien, and the alienee die seised, and the disseisee release his right to the heir of the alienee, although the disseisor has a right to the possession, (having aliened during his infancy,) of which he may avail himself in a possessory action; yet, if he bring a writ of right against the heir of the alienee, he will lose the land for ever, because the heir, by the release of the disseisee, has the greater right. (*c*)

Whenever there is an existing right of entry, the proper remedy, of course, at the present day, is an action of ejectment. Where the right of entry is gone, either by operation of the statute of limitations, or by any other means, and a right of possession is left in the claimant, a writ of entry, if it can be maintained under the circumstances, should be resorted to in preference to a writ of right. The distinction between real and personal actions in this respect should be kept in view. In personal actions, the bar upon verdict is perpetual, and the plaintiff cannot have another action of a higher nature, and has in such case no remedy but by motion, writ of error, or attaint.

(*a*) Dig. Action, (D. 2.)
(*b*) 3 Blacks. Com. 194.
(*c*) Litt. s. 478. Co. Litt. 278, b. 266, a.

In a real action, on the contrary, if there be a judgment against the demandant on verdict, demurrer, confession, &c., yet he may have an action of a higher nature, and try the same right again. (*a*)

The judgment in a real action is only a bar where the second action is of the same nature, and between the same parties, as a recovery in assize is a bar in another assize, or in a writ of entry in nature of an assize, because both actions are brought on the demandant's own possession; but, if the demandant be barred in assize, and afterwards bring a mortd'ancestor, or a writ of entry *sur disseisin*, shewing a descent or other special matter, the recovery in assize will be no bar (*b*); and so, though the demandant be barred in a formedon in the descender, he may still have a formedon in the reverter or remainder, for it is an action of a higher nature, and a fee-simple is to be recovered in it. (*c*) But, when judgment is given after the issue joined upon the mere right in a writ of right, it is for ever final and conclusive. (*d*)

(*a*) Ferrar's Case, 6 Rep. 7, a. Doct. Pl. 66. 4 Rep. 43, a.

(*b*) Ferrar's Case, 6 Rep. 7, b. See more as to former recovery, Com. Dig. Action, (K. 1.) and as to falsifying same, Id. Recovery, (B. 6.) Booth, 76.

(*c*) Robinson's Case, 5 Rep. 33, a. Doctr. Pl. 66.

(*d*) Co. Litt. 295, b. Herne v. Lilburne, 1 Bulstr. 161, and see post, in title "Judgment."

Of the Parties to Real Actions.

THE parties to real actions vary according to the nature of each particular writ. The persons, therefore, whom in bringing a real action, it is proper to make parties, are in general pointed out in that part of the present volume which treats of the writ. There are, however, certain rules, arising out of the quantity and nature of the estate, or right in the demandant or tenant, which apply to all real actions in general, and which are, therefore, collected in this place.

Demandants.

In general, the demandant in a real action must have a right to the freehold, and not merely a right to a chattel interest as a term of years. In one particular instance, a person possessing a right to a less estate may maintain a real action: viz. tenant by *elegit* who may have an assize of novel disseisin by stat. Westminster 2, c. 18. (*a*) Real actions being founded on the actual seisin of the demandant or his ancestor, it is necessary that the demandant himself should have been actually seised in an action brought upon his own seisin (*b*), or that his ancestor should have been actually seised in an action brought on the seisin of such ancestor (*c*), a seisin in law in such cases is not sufficient.

An alien *amie*, although he may bring personal actions, cannot maintain either real or mixed actions. (*d*)

Jointenants.

Jointenants being seised *per mie et per tout*, and deriving by one and the same title, must jointly implead and be impleaded. (*e*) If one of three jointenants release to the other two, they must join in an action for the whole land; but, if he release only to one of the two, the latter are only jointenants of two-thirds of the land, and the one to whom the release was made must bring a separate action for that third part of which he is tenant in common. (*f*)

Where one of two jointenants, demandants in a real action,

(*a*) 2 Inst. 396, and see post.
(*b*) Co. Litt. 160, a. Litt. sec. 681. Bevil's Case, 4 Rep. 10, b.
(*c*) See post, in title "Writ of Right."
(*d*) Co. Litt. 129, b. Dyer 2, b.
(*e*) Co. Litt. 180, b. Thel. D. l. 2. c. 2. Com. Dig. Abatem. (E. 9.) Bacon Ab. Jointen. (K.)
(*f*) Br. Ab. Jointenants, 2. Litt. sec. 312.

refuses to prosecute the suit, he may be summoned and severed, and the other jointenant may recover his moiety without him. (*a*) Jointenancy in the demandant must be taken advantage of by plea in abatement. (*b*) Demandants.

Coparceners, though several persons, are but one heir, and have one entire freehold in the land as long as it remains undivided, and must therefore, in general, join in a real action. (*c*) Where parceners sue in a real action ancestral, and the right descends to them from one and the same ancestor, then, though they be in several degrees from the common ancestor, they may join (*d*); but the issues of several coparceners cannot join as heirs to their mothers, because several rights descend. (*e*) Thus if a man has issue two daughters, and is disseised and dies, and the daughters have issue, and die, the issues shall join in a *præcipe*, because one right descends from the ancestor, but if the two daughters had been actually seised and subsequently disseised, then after their decease, the issues shall not join, because several rights descended to them from several ancestors. (*f*) If coparceners are disseised before partition, their possessory action must be joint, for their remedy must follow the nature of their possession; and that being joint, the remedy must be joint also. (*g*) Coparceners.

Where there are several coparceners of an advowson, and there has been no composition to present in turns, and no disagreement to present, it seems that they ought all to join in a *quare impedit*. (*h*) But where there has been a composition to present in turns, or where the coparceners cannot agree as to the mode of presenting, the parcener who is entitled to present may sue alone, or all the coparceners may join. (*i*)

In personal actions, tenants in common must join (*k*); but in real actions, and actions which are mixed with the realty, tenants in common must in general sever in action, because they Tenants in common.

(*a*) Co. Litt. 188, a. and see post, in title "Summons, and severance."

(*b*) Vide post, in "Pleas in Abatement."

(*c*) Co. Litt. 164, a. Thel. Dig. l. 2. c. 1. Vin. ab. Parceners. (P. Q.) Com. Dig. Parceners. (A. 5.) Bac. Ab. Coparceners. (B.)

(*d*) Co. Litt. 164, a The stat. of Glouc. c. 6, relating to this, is only in affirmance of the com. law. 2 Inst. 307.

(*e*) Co. Litt. 164, a. 2 Inst. 308.

(*f*) Co. Litt. 164, a.

(*g*) Bac. Ab. Copar. (B.) Br. Ab. Sev. Præcipe 1. Joinder in action, 38, 40. Co. Litt. 313.

(*h*) Wats. Clerg. Law, 254. Jenk. Cent. 2, but see Barker v. Bp. of Lond. 1 H. Bl. 417. Br. Ab. Joinder in Act. 103.

(*i*) Barker v. Bp. of London, 1 H. Bl. 417. 2 Inst. 365. F. N. B. 56 D.

(*k*) Baker v. Beresford, 2. Sid. 9. Co. Litt. 198, a.

Demandants.

have several freeholds, and claim by several titles. (*a*) Though where the thing to be recovered in a real or mixed action is entire, there, of necessity, tenants in common must join, as in a *quare impedit*, or writ of right of ward by tenants in common of a seignory. (*b*)

Baron and Feme.

In general, husband and wife must join in actions for the recovery of the wife's lands. (*c*)

Assignees of Bankrupts.

Assignees of a bankrupt may take advantage of a right of action to real property vested in the bankrupt, which will pass under the deed of bargain and sale, and may bring an action in their own names as assignees. (*d*)

Tenants.

In general, in all real actions, the writ must be brought against the actual tenant of the freehold, and not against tenant for years, by *elegit*, statute staple, &c., who has only a chattel interest, and who may plead non-tenure (*e*); but a seisin in law is sufficient without an actual seisin. (*f*) In one instance it may be necessary to join a party who is not tenant of the freehold, viz. in an assize of novel disseisin in which the disseisor, though not tenant of the land, ought always to be joined. (*g*) And the ordinary and clerk are joined with the patron in a *quare impedit*. (*h*)

Formerly, actions were maintainable in certain cases by particular statutes against the pernor of the profits (*i*), but by the operation of the statute of uses, those enactments have lost their force. (*k*)

When a party is made defendant in a real action *pendente lite* as by voucher or receit, he becomes what is called *tenant in law* to the demandant, and as to him is accounted actual tenant of the land, and may levy a fine to him, or accept a release from him; but he is not tenant with regard to a stranger, and cannot, therefore, accept a release from him. (*l*) So if the tenant pending a *præcipe* against him make a feoffment of the land, he still re-

(*a*) Co. Litt. 195, b. Vin. Ab. Jointenants. (U. a.) Thel. Dig. l. 2, c. 3.

(*b*) Co. Litt. 197, b. Barker v. Bp. of Lond. 1 H. Bl. 417.

(*c*) Co. Litt. 132, b. Com. Dig. Abatem. (E. 6.) Vin. Ab. Bar. and Feme, (R.) post, in title "Pleas in Abatement."

(*d*) Smith v. Coffin, 2 H. Bl. 444.

(*e*) See post, title "Pleas in Abatement."

(*f*) Litt. s. 680, 681. Co. Litt. 358, b.

(*g*) Com. Dig. Assize, (B. 6,) and see post, in Assize.

(*h*) See post, title "Quare Imp."

(*i*) 1 R. 2, st. 2. c. 9. 4 Hen. 4, c. 7. 11 Hen. 6, c. 7. 1 Hen. 7, c. 1; and see Reeve's Hist. III. 173, 231, 275. IV. 139. Chudleigh's Case, 1 Rep. 123, a.

(*k*) Co. Litt. 287, a. Dyer, 32, a. Chudleigh's Case, 1 Rep. 139, a.

(*l*) Co. Litt, 265, b. Butler & Baker's Case, 3 Rep. 29, b. Needler v. Bp. of Winch. Hob. 222.

mains tenant to the demandant, and may plead all pleas which the tenant of the land is entitled to plead; but the feoffee is tenant of the land with regard to all strangers. (*a*) Tenants.

As jointenants must jointly sue, so they must be jointly sued. (*b*) In general, jointenants cannot sue one another for injuries to the joint property; but when one of two jointenants disseises the other, the latter may recover against his cotenant in assise, or in an action of ejectment. (*c*) And by stat. West. 2, 13 Ed. 1, c. 22, one jointenant may sue his co-tenant for waste done in a wood, *turbary*, *piscary*, or the like. (*d*) A writ of partition lies between jointenants by the statutes 31 Hen. 8, c. 1, and 32 Hen. 8, c. 32. (*e*) Jointenants.

Coparceners, till partition made between them, have but one entire freehold, and therefore, they must be jointly sued. (*f*) If one coparcener deforces another of the land descended from the common ancestor, a *nuper obiit*, or writ of right *de rationabili parte* will lie. (*g*) A writ of partition lies between coparceners at common law. (*h*) Coparceners.

Tenants in common must be severally impleaded, because they have several freeholds. (*i*) A writ of partition lies for one tenant in common against the other, by 31 H. 8, c. 1, and 32 H. 8, c. 32. Tenants in Common.

In every action, where the inheritance or freehold is demanded, and where seisin of the inheritance or freehold is to be recovered, if the husband be seised in right of his wife, or jointly with his wife, by purchase made before or after the marriage, the action must be brought against them jointly; and so if the husband and wife were coheirs and parceners before the marriage, unless partition has been made before the marriage; and so if land descend to them in parcenary after the marriage. (*k*) Husband and wife.

What persons may become tenants in a real action by voucher, receit, or aid-prayer is stated in the following pages, under the proper heads.

(*a*) Ibid. and see post, title "Error."

(*b*) Co. Litt. 180, b. See post, title "Pleas in Abatement."

(*c*) Br. Ab. Assize, 252. 6 Rep. 12, b.

(*d*) 2 Inst. 403. Co. Litt. 200, b. And see post, in "Waste."

(*e*) See post, in "Partition."

(*f*) Co. Litt. 164, a. 167, b. Com. Dig. Parcener. (A. 4.) Br. Ab. Joinder in Action, 40, and post, title "Pleas in Abatement."

(*g*) See post.

(*h*) See post.

(*i*) Co. Litt. 195, b. Thel. Dig. l. 5. c. 3.

(*k*) Thel. Dig. l. 5, c. 4, s. 1. Com. Dig. Abatem. (E. 7.)

Of the Limitation of Real Actions.

ANCIENTLY, the time of limitation in many real actions was appointed by various statutes, to be computed from a fixed period, as in a writ of right, by the statute of Merton, from the coronation of Henry 2, and in mortd'ancestor, &c. by the same statute, from the last return of King John from Ireland (*a*); but the period of limitation thus appointed, becoming in process of time too great (*b*), the statute 32 Hen. 8, c. 2, was passed; upon which, and upon the statute 21 Jac. 1, c. 16, the law of limitations in real actions now rests.

Stat. 32 Hen. 8.

Writs of right, and writs in nature of writs of right.

By the former of these statutes, it is enacted, "that no person shall from henceforth sue, have, or maintain any writ of right, or make any prescription, title, or claim, of, to, or for any manors, lands, tenements, rents, annuities, commons, pensions, portions, corodies, or other hereditaments, of the possession of his or their ancestor or predecessor, and declare and allege any further seisin or possession of his or their ancestor or predecessors, but only of the seisin or possession of his ancestor or predecessor, which hath been, or now is or shall be seised of the said manors, lands, tenements, rents, annuities, commons, pensions, portions, corodies, or other hereditaments within threescore years next before the teste of the same writ, or next before the said prescription, title, or claim, so hereafter to be sued, commenced, brought, made, or had." And by sect. 3, "No person shall sue, have, or maintain, any action for any manors, lands, tenements, or other hereditaments, of or upon his or their own seisin or possession therein, above thirty years next before the teste of the original of the same writ hereafter to be brought."

All actions which are in the nature of a writ of right, and in which the plaintiff or demandant must count of a seisin and recover any hereditament, are within the statute. (*c*) Thus a writ *de consuetudinibus et servitiis*, must be brought within sixty years,

(*a*) 2 Inst. 94. Co. Litt. 114, b. Com. 193. Bac. Ab. Limitation of Actions. (A.) Com. Dig. Temps. (G. 1.) (G. 2.) 3 Bl. (*b*) 2 Inst. 94. (*c*) Com. Dig. Temps. (G. 1.)

because the demandant is to recover a seignory (*a*); so a writ of *nativo habendo*, for the plaintiff is to recover the villein (*b*); so a *quod permittat* for estovers (*c*); and a plaint in a base court for customary land, which the demandant makes protestation to sue in the nature of a writ of right is within the statute (*d*); so an action in a court of ancient demesne, on a writ of right close. (*e*) Stat. 32 Hen. 8.

But the following actions are not within the statute; a *cessavit*, for the seisin of the services is not traversable (*f*); nor a writ of escheat, because it is not brought on the seisin of the demandant or his ancestors in the land, but *ratione dominii* (*g*); nor a *ne injuste vexes*, because it is only to discharge the land, but not to recover any thing (*h*); nor a writ of mesne, for the same reason (*i*); nor a *quo jure* (*k*); nor a *warrantia chartæ quia timet* (*l*); nor a *quid juris clamat*, nor *per quæ servitia* (*m*); nor a writ of right of dower (*n*); nor a writ of right *sur disclaimer* (*o*); nor a writ of right of advowson (*p*); nor a writ of waste. (*q*)

Actions possessory.

It is further enacted, by the same statute, sec. 2, "that no manner of person shall hereafter sue, have, or maintain, any assize of mortd'ancestor, cosinage, aiel, writ of entry upon disseisin done to any of his ancestors or predecessors, or any other action possessory, upon the possession of any of his ancestors or predecessors for any manors, lands, tenements, or other hereditaments, of any further seisin or possession of his or their ancestor or predecessor, but only of the seisin or possession of his or their ancestor or predecessor, which was, or hereafter shall be seised of the same manors, lands, tenements, or other hereditaments within fifty years next before the teste of the original of the same writ hereafter to be brought." And when brought on the demandant's own seisin or possession, the time of limitation, by section 3, is thirty years.

In a very late case (*r*), it was held, that in a writ of intrusion,

(*a*) Br. Stat. of Lim. 16. Com. Dig. Temps. (G. 1.)
(*b*) Br. Stat. of Lim. 17. Com. Dig. ut sup.
(*c*) Br. Stat. of Lim. 24. Com. ut sup.
(*d*) Br. Stat. of Lim. 21. Com. ut sup.
(*e*) Br. Stat. of Lim. 22. Com. Dig. ut sup.
(*f*) Moor, 44. Br. Stat. of Lim. 16. Bevil's Case, 4 Rep. 11, a.
(*g*) Br. Stat. of Lim. 17.
(*h*) Id. 18.
(*i*) Ibid.
(*k*) Id. 19.
(*l*) Ibid.
(*m*) Id. 20.
(*n*) Id. 23, 90. See Park on Dower, 311. Com. Dig. Temps. (G. 9.)
(*o*) Br. Stat. of Lim. 23.
(*p*) Co. Litt. 115, a.
(*q*) Br. St. Lim. 20. Com. Dig. Temps, (G. 10.)
(*r*) Widdowson v. Earl of Harrington, 1 Jac. and Walk. 632; but see what is

Stat. 32 Hen. 8.

the fifty years allowed by this statute must be accounted from the seisin of the person who created the particular estate for life, and not from the death of the tenant for life, or the commencement of the adverse possession.

If a bishop, or any other sole corporation, sue upon the seisin of his predecessor, he shall be barred if the seisin was not within the time limited by the statute. (*a*) Where seisin or esplees are alleged, the count ought to allege them within the time of limitation. (*b*)

The seisin mentioned in the statute, is not a mere seisin in law, but an actual seisin. (*c*)

If the tenant intends to dispute the seisin of the demandant or his ancestor, as stated in the count, he must traverse it, otherwise the demandant will not be compelled to prove it. (*d*)

The savings in this statute for infants, feme coverts, and persons in prison, and beyond sea, extend only to persons who laboured under any of those disabilities at the time the statute was made. (*e*)

Stat. 1 Mar. c. 5.

By statute 1 Mar. c. 5, it is enacted, that the 32 Hen. 8, c. 2, shall not extend to any writ of right of advowson, *quare impedit*, or assize of darrein presentment, or *jure patronatus* (*f*), nor to any writ of right of ward, writ of ravishment of ward for the wardship of the body, or for the wardship of any castles, honors, manors, lands, tenements, or hereditaments, holden by knight service, but that such suits may be brought as before the making of the said act.

said by Gibbs, C. J. in Romilly v. James, 1 Marsh, 599, and quære, for it might be impossible for the demandant or his ancestor to get seisin of the land if the tenant lived more than fifty years; and see Bevil's Case, 4 Rep. 11, a; where it is said (on the fourth section of the same stat.) that if the lord release the services to the tenant, as long as J. S. has heirs of his body, and sixty years pass, and J. S. afterwards dies without heirs of his body, the lord may yet distrain, for it was impossible that he should attain to any seisin within that time, and *impotentia excusat legem*. See the arguments in Romilly v. James, 6 Taunt. 263. 1 Marsh. 592. s. c.

(*a*) Br. Stat. of Lim. 33. Com. Dig. Temps. (G. 1.) but see Wats. Clerg. Law, 438.

(*b*) Br. St. of Lim. 13. Com. Dig. ut sup; and see post, in title "Count."

(*c*) Bevil's Case, 4 Rep. 10, b. Br. Stat. of Lim. 96. Widdowson v. Earl of Harrington, 1 Jac. and Walk. 547.

(*d*) See the sixth sec. of the statute, Widdowson v. Earl of Harrington, 1 Jac. and Walk. 557.

(*e*) See Sugd. Vend. and Purch. 331. It is misstated in Bacon's Abridgment.

(*f*) The provisions of the statute of 7 Ann. c. 18, have rendered this statute of no use, Harg. Note Co. Litt. 115, a. (6.)

By the 21 Jac. 1, c. 16, it is enacted, "that all writs of formedon in descender, formedon in remainder, and formedon in reverter (*a*), at any time hereafter to be sued or brought, of or for any manors, lands, tenements, or hereditaments, whereunto any person or persons now hath or have any title or cause to have or pursue any such writ, shall be sued and taken within twenty years next after the end of this present session of parliament, and after the said twenty years expired, no such person or persons, or any of their heirs, shall have or maintain any such writ of or for any of the said manors, lands, tenements, or hereditaments; and that all writs of formedon in descender, formedon in remainder, and formedon in reverter, of any manors, lands, tenements, or other hereditaments whatsoever, at any time hereafter to be sued or brought by occasion or means of any title or cause hereafter happening, shall be sued and taken within twenty years next after the title and cause of action first descended or fallen, and at no time after the said twenty years; and that no person or persons that now hath any right or title of entry into any manors, lands, tenements, or hereditaments, now held from him or them, shall thereinto enter but within twenty years next after the end of this present session of parliament, or within twenty years next after any other title of entry accrued, and that no person or persons shall at any time hereafter, make any entry into any lands, tenements, or hereditaments, but within twenty years next after his or their right or title, which shall hereafter first descend or accrue to the same; and in default thereof, such persons so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made, any former law or statute to the contrary notwithstanding."

Stat. 21 Jac. 1.

Formedon.

"Provided, that if any person or persons that is or shall be entitled to such writ or writs, or that hath or shall have such right or title of entry, be, or shall be at the time of the said right or title first descended, accrued, come, or fallen, within the age of one and twenty years, feme covert, *non compos mentis*, imprisoned, or beyond the seas, that then such person and persons, and his and their heir and heirs, shall or may, notwithstanding the said twenty years be expired, bring his action or make his entry, as he might have done before this act, so as such person and persons, or his or their heir and heirs shall, within ten years next

(*a*) By stat. 32 Hen. 8, c. 2, formedons sued within fifty years after the title or in reverter and remainder were to be cause of action fallen.

Stat. 21 Jac. 1. after his and their full age, discoverture, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take benefit of and sue forth the same, and at no time after the said ten years."

In construing this statute, it has been held, that where tenant in tail dies, leaving issue in tail a *feme covert*, who dies under coverture, leaving issue two sons, both infants, and the eldest attains twenty-one years, and dies without issue, leaving his brother under age, who does not sue out his writ of *formedon* within ten years after attaining twenty-one, and more than twenty years after the right first descended, the statute operates as a bar. (*a*) The ground of this decision is, that the period of ten years began to run on the elder brother attaining his full age, and was not stayed by the subsequent disability of the younger brother. In a very late case (*b*), it was held, that the twenty years limited by this statute begin to run when the title descends to the first heir in tail, and that each succeeding heir has no new right to sue within twenty years from the death of his predecessor. The issues in tail have no distinct and successive rights under this statute, but are barred like the heirs of estates in fee-simple. (*c*)

It was held by Lord Ellenborough (*d*), that the word *death* in the saving clause of this statute must mean and refer to the death of the person to whom the right first accrued, and whose heir the claimant is, and that the statute meant, that the heir of every person, to which person a right of entry had accrued during any of the disabilities there stated, should have ten years from the death of his ancestor, to whom the right first accrued during the period of disability, and who died under such disability, (notwithstanding the twenty years from the first accruing of the title to the ancestor should have before expired). Mr. Justice Lawrence also, in the same case, gave his opinion, that the ten years to the heir run from *the death of the party dying under the disability*. It appears, however, that it was not necessary in this case for the court to decide from what period the ten years should run, for more than ten years had elapsed from the time when the disability of the plaintiff ceased. In the case of Cotterell v. Dutton, the court was of opinion, that the heir

(*a*) Cotterell v. Dutton, 4 Taunt. 826. (6th edit.)

(*b*) Tolson v. Kaye, 3 Br. and Bing. 217.

(*c*) Cotterell v. Dutton, 4 Taunt. 830, and see Sugd. Vend. and Purch. 332.

(*d*) Doe v. Jesson, 6 East, 84, recognized by Dallas, C. J. in Tolson v. Kaye, 3 B. and B. 224.

has ten years *after the disability ceases*, and not merely from the death of the ancestor who died under such disability, and that the ten years do not run at all while there is a continuance of disabilities. It is said, that this construction has been invariably adopted in practice. (*a*) Stat. 21 Jac. 1.

Though a person may be barred of one remedy by this statute, yet he may pursue any other remedy which afterwards accrues to him. Thus, where a tenant in tail discontinues for three lives, and the issue in tail is barred of his *formedon* by this statute, yet, upon the deaths of the three tenants for life, the issue in tail may enter. (*b*)

By statute 10 and 11 W. 3, c. 14, no fine, common recovery, or judgment in action real or personal, shall be reversed or avoided, for any error or defect therein, unless the writ of error or suit for reversing such fine, recovery, or judgment, be commenced, or brought and prosecuted with effect, within twenty years after such fine levied, recovery suffered, or judgment signed or entered of record. (*c*) It has been held under this statute, that a reversioner cannot have error after twenty years, though his title did not accrue until after the expiration of them, and, though error is brought in less than twenty years after the commencement of his title. (*d*) Stat. 10 and 11 W. 3, c. 14. Writs of Error.

This act gives five years in case of disability.

It has not been determined, whether this statute extends to a writ of deceit brought to reverse a recovery suffered in the king's court of lands held in ancient demesne. The late Mr. Serjeant Hill was of opinion, that it did extend to such a writ. (*e*)

Suits instituted by the crown are limited by statute 9 Geo. 3, c. 16, to sixty years. 9 Geo. 3, c. 16.

(*a*) See Sugd. Vend. and Purch. 334. (6th edit.)

(*b*) Hunt v. Bourne, 2 Salk. 422. Latw. 781. Com. Rep. 124. 1 Br. Parl. C. 53. 8. C.

(*c*) Com. Dig. Temps. (G. 5.)

(*d*) Lloyd v. Vaughan, 2 Strange, 1257.

(*e*) 5 Cruise Dig. 604.

Of the Writ.

In general.

THE writ in real actions is, as we have seen, either a *præcipe quod reddat*, a *præcipe quod faciat*, a *præcipe quod permittat*, or a *pone* or attachment, varying in its form according to the nature of the thing demanded, and the title of the demandant. The particular form, and the peculiar qualities of each writ, will be stated in the following pages, under the proper title of the action. In real actions the writ is original, and there must, therefore, be fifteen days in every case between the teste and return. (*a*)

Writ general or special.

Writs are said to be either general or special (*b*); general, where the particulars of the demand or of the demandant's title are disclosed in the count or declaration, and not in the writ; and special, where they are disclosed in the writ also. Thus, with regard to the particulars of the demand, in dower *unde nihil habet*, and in assize (*c*), the particular quantity of land which the demandant claims is not set out in the writ. In the first action, the tenant is commanded to render to the demandant her reasonable dower of *the freehold* which was of her husband; and, in the latter, the writ, after reciting that the plaintiff has complained of being unjustly disseised of his *freehold* in such a place, commands the sheriff to reseise the tenements, &c. In a writ of right on the contrary, the quantity of the land demanded is specified in the writ, and the tenant is commanded to render so many acres of meadow, and so many acres of pasture, &c.

Writs *quia timet*.

There are certain writs in the realty which may be maintained in anticipation, and before any disturbance or damage has actually accrued, and these are denominated writs *quia timet*, as a *warrantia chartæ* before the plaintiff is impleaded, a writ of *mesne* before he is distrained, a *curia claudenda* before default of inclosure, and a *ne injuste vexes* before molestation. (*d*)

(*a*) There are, indeed, one or two exceptions to this rule, in actions not properly real, but relating to the realty, in which the writ may be either original or judicial, as in estrepement, 2 Inst. 328.

(*b*) Vin. Ab. Writ. (D.) Com. Dig. Pleader. (c. 15.)

(*c*) Br. Ab. Brief, 348. Sparry's Case, 5 Rep. 61, a.

(*d*) Co. Litt. 100, a. and see post, under each of the writs.

In general.

Statement of title.

With regard to the statement of title the writ is in many actions general, while the count is special. Thus, in an action of waste, if the lease was made to husband and wife during the coverture, the lessor who brings waste against them may state in his writ, that they hold for term of life, but, in his declaration, he must shew how, and in what manner the lease was made. (*a*) So in a *quare impedit*, for a church donative, the writ is general, that the defendant permit the plaintiff *to present* to the church, but the particular title is stated in the count. (*b*) In the same manner, in some writs of entry, a title is allowed to be stated generally in the writ, which must be set out with particularity in the count, as in a *cui in vita* brought where the husband seised in right of his wife has aliened the lands; in this case, if the wife was seised in tail, it is not necessary to shew the seisin of the donor, and the making of the estate tail in the writ, but merely to say, "which she claims to her and the heirs of her body of the demise, which A. made to her, &c.;" but the seisin of the donor, and the creation of the entail, must be shewn in the count. (*c*) In *formedon*, on the contrary, the demandant must set out his title in the writ as well as in the count. (*d*)

It seems, that whenever the demandant seeks to recover a fee-simple, he may say in his writ, *quam clamat esse jus et hæreditatem suam*, although he be in fact a purchaser. (*e*) But, when the demandant claims an estate tail or for life, these words ought not to be inserted (*f*); in such case, both the writ and count ought to be special, viz. that A. gave to B. for life, remainder to C. in tail whose cousin and heir the said D. is. (*g*)

Demand.

The words by which hereditaments are to be demanded in a *præcipe quod reddat* are given in the Register (*h*), and are as follows:

Messuage, toft, mill, dovecot, garden, land, meadow, pasture, wood, heath, moor, juncary, marsh, alder, ruscary (*i*), rent.

The order in which these words are placed should be pre-

(*a*) Litt. s. 381, and see Skeat v. Onesbridge, Hob. 84.

(*b*) Co. Litt. 344, a. and see post.

(*c*) Booth, 187, and see Skeat v. Onesbridge, Hob. 84.

(*d*) Br. Ab. Omission 5, and see post.

(*e*) Litt. s. 9. Co. Litt. 16, a. F. N. B. 191, D. 193, C. note (*b*).

(*f*) F. N. B. 191, E.

(*g*) F. N. B. 191. E. note (*a*), but see Id. 191, A. Dyer, 101, a. Booth, 177, that the writ and count may be general.

(*h*) Reg. Br. 2, a. Booth, 2. F. N. B. 2, C.

(*i*) In some editions of F. N. B. *piscary* is put instead of *ruscary*. See Co. Litt. 5, a.

In general.

served in the writ, for it is a rule, that the more worthy shall be placed before the less worthy; the general before the special; and the entire before the parts. Thus, land built upon is said to be more worthy than other land, because it serves for the habitation of man, and in that respect has the precedency to be demanded in a *præcipe* (*a*), but a writ has been adjudged good in which this order was not observed. (*b*)

The words in the register are not the only names by which hereditaments may be demanded. (*c*) In very early times land might be demanded by such names as *bovata terræ, carucata terræ, jugum terræ, &c.* (*d*) "Land covered with water" may be demanded in a *præcipe* (*e*), and so may an honor or a manor (*f*), so also an office. (*g*) It appears, that a *præcipe quod reddat* cannot be maintained for a service which lies only in *feasance*, for the remedy is by writ *de consuetudinibus et servitiis*, by distress or by *cessavit*. (*h*) A hospital or chapel may be demanded by the name of a messuage (*i*); but a messuage cannot be demanded by the name of a tenement (*k*), or of a house. (*l*) Many things will pass in a grant by a name by which they cannot be demanded in a *præcipe*, though that which may be demanded in a *præcipe*, will pass by the same name in a grant. (*m*)

By statute 32 H. 8, c. 7, a *præcipe quod reddat* lies of tithes, pensions, or other ecclesiastical or spiritual profit, which by law have been made temporal, or admitted to abide in temporal hands. (*n*)

Venue.

Every action for the recovery of the seisin or possession of land, must be brought in the county where the land lies (*o*), and so in mixed actions, and in actions relating to the realty, the *venue* is local. (*p*)

(*a*) Thel. Dig. l. 8, c. 20. Plow. Com. 169.

(*b*) Thel. Dig. l. 8, c. 20, s. 5.

(*c*) Thel. Dig. l. 8, c. 2. Y. 1. Macdunceh v. Stafford, 2 Rol. Rep. 167.

(*d*) Co. Litt. 5, a. b. Br. Ab. Demand, 23.

(*e*) Co. Litt. 4, a. Challenor v. Thomas, Yelv. 143.

(*f*) Thel. Dig. l. 8, c. 2.

(*g*) Webb's Case, 8 Rep. 47, a. Thel. Dig. l. 8, c. 5, s. 1. Co. Litt. 20, a.

(*h*) Thel. Dig. l. 8, c. 6, s. 5. Co. Litt. 151, a.

(*i*) Br. Ab. Demand, 29.

(*k*) Br. Ab. Demand, 54, and see post in title, "Ejectment."

(*l*) Co. Litt. 56, b.

(*m*) Co. Litt. 5, b.

(*n*) Co. Litt. 159, a.

(*o*) Com. Dig. Action, (N. 1.) Bac. Ab. Action, (A. a.) Bulwer's Case, 7 Rep. 2, b.

(*p*) Mayor of Berwick v. Ewart, 2 W. Blacks. 1070, and see 1 Chitty Pl. 270.

Of Writs of Right.

A WRIT of right properly lies where the demandant has only the right of property, the *jus proprietatis*, the *jus merum*, or mere right, as it has been called, and where his estate has been devested and put to a right. It is the only remedy where the owner of land in fee-simple has lost the possession and the right of possession, and is consequently barred of the inferior remedies which the law has provided. Thus, if a man be disseised, the law gives the disseisee the right of recovering his lands immediately, by entering upon the tortious possession of the disseisor, or by bringing a possessory action; if, however, he should neglect to pursue this right, and the disseisor should die, (having been in possession five years, as required by the statute, 32 H. 8, c. 35,) the heir of the disseisee, in consequence of the disseisor's acquiescence, and neglect to enter, acquires an apparent *jus possessionis*, or right of possession; for, as the possession is cast upon him by descent, which is an act of law, he shall not be deprived of it by the act of the negligent disseisee, but by process of law, and the disseisee is therefore driven to his writ of entry. Should he still neglect to pursue the latter remedy within the period limited by law, he must then resort to his *jus proprietatis*, and bring his writ of right. (*a*) Whenever a fee-simple is in dispute, a writ of right is a concurrent remedy with other real writs and mixed actions, but, as judgment after issue joined on the mere right is final, it is imprudent to bring it when a lower remedy would be equally effectual.

Writ of right.

Where applicable.

There are several writs which are said to be in the nature of writs of right, as *formedon* in the descender, *quo jure, ne injuste vexes, de consuetudinibus et servitiis, quod permittat* in the *debet, secta ad molendinum*, and writ of right of advowson. (*b*)

Writs in nature of writs of right.

Writs of right properly so called, are either patent or close (*c*),

Writs of right proper.

(a) Co. Litt. 266, a. Gilb. Ten. 20. 2 Bl. Com. 197.

(b) Co. Litt. 158, b. Br. Ab. Droit de recte, 51, 33, 34, and see post.

(c) Writs of right are *close* when directed to the sheriff; *patent* when directed to the lord, &c. 3 Reeves Hist. 45.

Writ of right.

and are of four kinds: 1. The writ of right patent, which lies where the lands are held of the king as of some honor, manor, &c. (*a*), or of some other lord. 2. The writ of right *quia dominus remisit curiam*, which is a writ close, and is nothing more than the writ of right patent brought in the king's court instead of the lord's, by license of the latter. (*b*) 3. The *præcipe in capite*, which is also a writ close, and lies where the land is holden of the king *ut de corona*, and not *ut de honore*, &c. (*c*) 4. The writ of right patent in London of lands within the city. (*d*) To these writs of right may be added the writ of right close in ancient demesne, and the writ of right *de rationabili parte*, the writ of right of advowson, and the writ of right of dower.

Right patent.

The writ of right patent for lands held of the king, as of an honor, &c. is directed to the king's bailiffs, or when the lands are held of the king in burgage to the mayor and sheriffs or bailiffs of the city or borough, as bailiffs or officers of the king. (*e*) Where the lands are held of some other lord, the writ ought to be directed to him; and, if such lord be out of the realm, then to his bailiff. (*f*) The writ is in the nature of a commission to the lord or bailiff of the manor, that he do right. If the writ be brought in the court of a bishop, it is directed to him, but, if brought during the vacancy of the bishopric, of lands which are in the bishopric, and in the king's hands, by reason of the vacancy, it may be directed either to the king's bailiff, or to the bailiff of the bishop elect. (*g*)

It is not usual at the present day to bring a writ of right patent in the lord's court. If brought there, it may be removed from thence by the demandant into the county court by *tolt*, and thence by *pone* into the Common Pleas, or the tenant for good cause shewn may remove it at once from the lord's court into the Common Pleas by *recordari*, or from the county court into the Common Pleas by *pone*, shewing cause in the writ. (*h*)

Quia dominus remisit curiam.

The writ of right *quia dominus remisit curiam* is directed to the sheriff of the county where the lands lie. Formerly the lord was accustomed to grant a licence to his tenant to sue his writ of

(*a*) See the distinction as to Tenures of the king, *ut de corona*, and *ut de honore*, &c. Mad. Bar. Ang. 163. Hargrave's Note. to Co. Litt. 77, a. (39), and 188, a. (118.)

(*b*) F. N. B. 2 F.

(*c*) F. N. B. 5 E.

(*d*) F. N. B. 6 A.

(*e*) F. N. B. 1 I. 6 D.

(*f*) F. N. B. 1 F. H.

(*g*) F. N. B. 1 F. 2 E.

(*h*) F. N. B. 3, 4. Booth 89, 90, 91. 2 Saund. 45, d. (note.)

right in the king's court, or before the justices, as well after the writ purchased and returned into the Common Pleas as before, and the following clause was inserted at the end of the writ after the teste, *Because* A. (the chief lord of the fee,) *hath thereupon remitted to us his court.* If this clause was inserted in the writ, it was immaterial whether there was any letter from the lord proving his assent or not, and, if the tenant sued such a writ without licence, and recovered, such recovery appears to have been good. (*a*) In modern practice, the action is always commenced in the Common Pleas, by this writ, and even the words *quia dominus remisit curiam* are omitted. (*b*) Writ of right.

The *præcipe in capite* is, as already stated, directed to the sheriff of the county where the lands lie. It may be brought at the present day, as well as the writ of right *quia dominus remisit curiam*, and is precisely the same in effect. (*c*) *Præcipe in capite.*

The writ of right in London is directed to the mayor and sheriffs, for every *præcipe quod reddat* of lands or tenements in London shall be directed to the mayor and sheriffs jointly, but every other writ to the sheriffs alone. (*d*) This writ cannot be removed by *tolt* and *pone*, or *recordari*, like a writ directed to the lord of a manor. (*e*) If the tenant vouch a person in a foreign county, or plead a plea which cannot be tried in London, the record may be removed into the Common Pleas, and when the voucher or plea has been there decided, a *procedendo* may issue, commanding the mayor and sheriffs to proceed in the cause in London. (*f*) *Right in London.*

A writ of right can only be brought by a tenant in fee-simple, and not by any one who has a less estate, as tenant in tail, in frankmarriage, for life, &c. (*g*) A bishop or master of a hospital, who has the inheritance of the lands in himself, mayor and commonalty, or bailiffs and commonalty, may have it (*h*); but it does not lie for a parson, because he has not the absolute fee (*i*), and his highest remedy is a writ of *juris utrum*. (*k*) Nor for a prebendary, for he has not a higher estate than a parson. (*l*) A By whom brought.

(*a*) F. N. B. 2 F. 3 A. B. C.
(*b*) Booth, 91. 2 Saund. 45, d. note.
(*c*) The writ in Tyssen v. Clarke, was a *præcipe in capite*. 3 Wils. 558.
(*d*) F. N. B. 6 E. O. N. B. 6 a.
(*e*) F. N. B 6 E.
(*f*) F. N. B. 6 E. 2 Inst. 325. 6 Booth, 117, and see post, in "Voucher."
(*g*) F. N. B. 1 B. &c.
(*h*) F. N. B. 5 C. Co. Litt. 341, b. 342, a.
(*i*) 1 Rol. Ab. 686, l. 11. Gilb. Ten. 114. F. N. B. 5 C.
(*k*) Br. Ab. *Droit de recto* 1.
(*l*) 1 Rol. Ab. 686, l. 13. F. N. B. 5 C.

Writ of right.

person who has a determinable or base fee, as where he has an estate to him and his heirs as long as I. S. shall have issue of his body, may maintain a writ of right, for he cannot have any other writ in the right, as a tenant in tail, or a parson may. (*a*)

Seisin necessary.

A writ of right may be maintained either on the seisin of the demandant, or of one of his ancestors, but such seisin must be an actual seisin, and not a mere seisin in law. (*b*) A purchaser therefore, who has never gained actual seisin, cannot bring a writ of right, for the seisin of him, from whom he purchased is of no avail. (*c*) It must be observed, however, that there is a distinction between the actual seisin here mentioned, and that which is necessary to make a *possessio fratris*, for, in the latter case, a more actual seisin is said to be requisite. (*d*) Thus, a seisin obtained by wrong, and defeated by the entry of the right owner, is sufficient to maintain a writ of right. (*e*) And, where lands are conveyed to A. for life, remainder to B. for life, remainder to the right heirs of A., and A. dies, and B. enters and dies, and a stranger intrudes, the heir of A. may have a writ of right on the seisin which A. had. (*f*) So, if lands are given to A. and B., and the heirs of A., and A. dies, and the land is recovered against B., the heir of A. may have a writ of right for the whole. (*g*) So also if lands are given in tail the remainder to A. in fee, and the donee dies without issue, his wife *privement enseint*, and A. enters, and the issue is born, and enters upon A., and dies without issue, A. may maintain a writ of right on the seisin which was thus defeated. (*h*) Again, if lands be given in tail to A. the remainder to his right heirs, and A. dies without issue, his collateral heir may maintain a writ of right on the seisin which A. had when he occupied under the estate tail. (*i*)

Against whom.

The tenant in a writ of right must have a freehold at least, and therefore it must not be brought against tenant for years, or by *elegit*, statute merchant, or statute staple. (*k*) When brought against a tenant for life, or parson, the tenant ought not to join the mise upon the mere right, on account of the weakness of his estate. (*l*) And if tenant for life do so, it is a forfeiture of his

(*a*) 1 Rol. Ab. 686, l. 20.
(*b*) Litt. sec. 514. Bevil's Case, 4 Rep. 9, a.
(*c*) Co. Litt. 293, a. Dally v. King, 1 H. Black. 1.
(*d*) Co. Litt. 281, a.
(*e*) Co. Litt. 280, b.
(*f*) Co. Litt. 281, a.
(*g*) Ibid.
(*h*) Ibid.
(*i*) Ibid.
(*k*) F. N. B. 1 E.
(*l*) 1 Rol. Ab. 686, l. 28.

estate. (*a*) But the tenant for life may, it is said, join the mise in a special manner, viz. that he has better right to hold for term of his life, the reversion to such a one. (*b*) Or he may at once pray in aid the reversioner or remainderman. (*c*) Writ of right.

A writ of right lies in general for lands or tenements (*d*); that is, for such things as may be demanded in a *præcipe* (*e*); but it does not lie for incorporeal hereditaments, as common, &c. (*f*) It lies also for rent service, but not, as it seems, for a rent-charge, or rent-seck. (*g*) For what.

The time of limitation is thirty years on the demandant's own seisin, and sixty on his ancestor's. The process in a writ of right is summons and grand cape before appearance; and petit cape after appearance. The demandant or tenant may be essoigned; view, voucher, aid prayer and receit lie. The trial is by the grand assize, when the mise is joined upon the mere right, or by a common jury, when issue is joined upon a collateral point; the trial may be either at bar, or at nisi prius. No damages or cost are recoverable. (*h*) Proceedings on, &c.

The writ of right close in ancient demesne, or the petty writ of right close, as it is sometimes called, lies for tenants who hold lands or tenements in ancient demesne (*i*); but where the demandant sues for the manor itself, or for the demesne lands, parcel of the manor, which are not in the hands of a free tenant holding of the manor, he ought to bring his action in the Common Pleas. (*k*) The writ is directed to the lord of the manor, and the demandant may make protestation to pursue it in the nature of what real action he pleases, as of a proper writ of right, or of an assize of novel disseisin, writ of dower, &c.; and therefore it lies for tenant in fee-simple, fee-tail, for life, or in dower, &c. (*l*) And in that case the precept follows the nature of the process appropriate to such writ. (*m*) Writ of right close in ancient demesne.

(*a*) Sir W. Pelham's case, 1 Rep. 16, a. 4 Leon, 126, 128, 132. S. C.
(*b*) O. N. B. 3, b.
(*c*) See post, in "Aid prayer."
(*d*) F. N. B. 1 B.
(*e*) Reg. Br. 2, a, and see ante p. 17.
(*f*) F. N. B. 1 B.
(*g*) F. N. B. 6, A. (margin) Fitz Ab. Droit, 31; but see Littleton, s. 236. Co. Litt. 160, a.
(*h*) See post, under the proper heads.
(*i*) F. N. B. 11 F. See 2 Scriven on Copyholds, 661.
(*k*) F. N. B. 11 M.
(*l*) F. N. B. 11 E. 12. Booth, 116. Rast. Ent. 241, b.
(*m*) F. N. B. 12 N.

Writ of right close in ancient demesne.

The demandant in a petty writ of right close, cannot remove the plea out of the lord's court for any cause. (*a*) But the tenant may remove it for any causes which shew the land to be frank-fee (*b*), as well as for other causes, according to some authorities, as if there be no suitors; for then, as the suitors are judges, there is a failure of justice within the manor (*c*); but it does not seem to be a sufficient cause that the demandant is bailiff, or related to the bailiff, or that the bailiff maintains the demandant. (*d*) Where the tenant removes the plea for some cause which shews the land to be frank-fee, he may state generally in the *recordari*, that he claims to hold at common law; in which case, he will be allowed in the Common Pleas to shew any cause which proves the land frank-fee; but if he states the cause specially in the writ, he cannot allege any other cause. (*e*)

If the demandant make protestation to sue his writ in the nature of a writ of right proper, and the mise is joined on the mere right, it seems that the cause shall not be removed, but a precept shall issue to the bailiff, to summon four elisors instead of the knights, to elect a jury in the nature of the grand assize. (*f*)

If the tenant plead a foreign plea, that cannot be tried in the court of ancient demesne, or vouch a foreigner to warranty, that is, a person out of the jurisdiction, a writ of supersedeas may be sued out of Chancery directed to the lord of the manor, commanding him to surcease (*g*); and the record being removed into the Common Pleas by *recordari*, process issues against the vouchee (*h*), or the plea is properly determined there; thus if it be a plea of bastardy, that court will write to the bishop to certify the fact, which the inferior court could not have done, and on the voucher or plea being determined, a *procedendo* issues remanding the cause for final determination to the court of ancient demesne. (*i*)

(*a*) F. N. B. 13 B. 4 Inst. 269.

(*b*) F. N. B. 13 B. C. Com. Dig. Anc. Dem. (G. 5.)

(*c*) 4 Inst. 270. F. N. B. 13 C. Vin. Ab. Anc. Dem. (O. 2.)

(*d*) 11 H. 6, 10. a. 34 H. 6. 35, a. 3 H. 4, 14, a. Hale's note to F. N. B. 13 B. (a.) but see Booth, 116, Rast. Ent. 242, b.

(*e*) F. N. B. 13 F. Ibid, Hale's note (a.)

(*f*) Stafford's Case, Dyer, 111, b. Rast. Ent. 241, b. But see Y. B. 1 H. 7, 30, a. Br. Ab. Anc. Dem. 35. F. N. B. 13 G. contra; and see Hale's note. Ib. (b.) Booth, 116.

(*g*) F. N. B. 13 G.

(*h*) See post, in "Voucher."

(*i*) 2 Inst. 325, b. Dyer, 69, b. Com. Dig. Anc. Dem. (G. 5.)

If the lord proceed after the *supersedeas*, he may be attached in the Common Pleas. (*a*) And if no *supersedeas* be issued, but the record is removed into the Common Pleas by *recordari*, and the lord still proceeds, a *certiorari* may be sued out of Chancery, directed to the justices of the Common Pleas, to certify the tenor of the record, and of the removal into Chancery; and upon such certificate an attachment may issue returnable in the Common Pleas. (*b*)

Writ of right close in ancient demesne.

A copyholder cannot have a writ of right close, but must proceed by bill in the court of the lord, and make protestation to sue such bill in the nature of the proper action. (*c*)

This writ lies between privies in blood, as between brothers in gavelkind, or between sisters, or other coparceners, for lands in fee-simple. Thus if the ancestor leases his lands for life, and dies and leaves issue two daughters, and the tenant for life dies and one daughter enters upon the whole land and deforces her sister, the latter is entitled to a writ of right *de rationabili parte*. Several coparceners may have this writ against a single coparcener who deforces them. If the ancestor was seised either at the time of his death, or at any other time, this writ lies, and where he was seised at the time of his death, it is a concurrent remedy with *sur per obiit*. (*d*)

Writ of right *de rationabili parte*.

If the ancestor was seised of an estate tail, and on his death one coparcener deforces another, a formedon is the proper remedy; and if a stranger deforces a coparcener, an assize of mort-d'ancestor, a writ of intrusion, or an ejectment, as the case may be, must be resorted to. If the writ be brought against a stranger, it may be abated. (*e*)

This writ is a writ of right patent, and is properly directed to the lord of whom the lands are holden, and may be removed by tolt, &c., like the common writ of right. (*f*) Like that writ it may also be brought in the Common Pleas *quia dominus remisit*

(*a*) F. N. B. 14 A. Com. Dig. Anc. Dem. (G. 5.)

(*b*) F. N. B. 13 H.

(*c*) F. N. B. 12 B. C.

(*d*) Reg. 3, b. F. N. B. 9. Booth is therefore incorrect in saying, that the tenant may plead in abatement, that the demandant's ancestor died seised, p. 120.

(*e*) F. N. B. 10 B. 9 G.

(*f*) F. N. B. 9 G.

Writ of right *de rationabili parte.*

curiam, and the process there is summons, grand cape, and petit cape. (*a*) On account of the privity of blood between him and the demandant, the tenant cannot put himself upon the grand assize. (*b*) In the writ the demandant must demand a certain portion of land as ten acres, which he may, it is said, have judgment to recover and hold in severalty. (*c*)

Neither voucher nor view lie in this writ on account of the privity of blood. (*d*)

Writ of right of advowson.

At common law there were three writs for remedying injuries to rights of patronage. 1. The writ of right of advowson, which was for the recovery of the advowson, when the patron had been put to his mere right; 2, the writ of *quare impedit;* and 3, the assise of *darrein presentment*. Both the latter actions were, originally, merely possessory. (*e*)

It was necessary at common law, to resort to the writ of right of advowson, in every instance where there had been an usurpation, and where the clerk of the usurper who had presented, had been admitted and instituted; for by this, as against a common person, the church was full, and the estate of the true patron was put to a right. This being found productive of much injustice and inconvenience, the statute of West. 2, c. 5, was passed, which gave a *quare impedit* in many cases where it was before necessary to resort to a writ of right. By the first branch of that statute, infants and feme coverts, who had advowsons by descent, issues in tail, and the heirs of reversioners after estates for life, &c., were enabled, in case of usurpation in the time of their guardians, during coverture, during the particular estate, and in the life-time of the ancestor in tail, respectively, on the church becoming again vacant, to bring a *quare impedit*, the infants on their full age, or, as it seems, during their infancy, the wives on the death of their husbands, the heir of the reversioner on the falling in of the reversion, and the issue in tail on the

(*a*) F. N. B. 9 O.

(*b*) F. N. B. 9 G. for then one brother might have waged battle against another, which the law would not allow. Plow. Com. 306.

(*c*) F. N. B. 9 K. L. but see Co. Litt. 167, b. 187, a.

(*d*) F. N. B. 9 N. and see "Voucher" and "View," post.

(*e*) Stat. West. 2. c. 5. 2 Inst. 356. Watson's Clerg. Law, 131.

accruing of the estate tail, respectively. (*a*) It should also be observed, that the statute seems to have given these privileged persons the power of presenting on the next avoidance, as consequent on the right of bringing a *quare impedit*. (*b*) Writ of right of advowson.

By the second branch of the statute of West. 2, c. 5, it is enacted, "that in actions of *darrein presentment*, and *quare impedit*, the plea of plenarty shall be no bar, provided the action be brought within six months." This was the most important provision of the statute, and enabled many persons who were absolutely barred before, to recover their advowsons. Thus, before this act, if a purchaser in fee of an advowson suffered an usurpation before he had presented, he not only lost his presentation *hac vice*, but the advowson itself for ever. He could not have a writ of right, because he could not count either upon his own presentation or that of his ancestor; and he could not have a possessory writ, because plenarty was a bar. So if tenant in tail, or for life, suffered an usurpation, he was likewise remediless. (*c*) The second branch of the statute, by taking away the plea of plenarty, during six months, enabled the true patron to recover his advowson in these cases by *quare impedit*, for in that action a purchaser may count on the presentation of his vendor, or of him whose estate he has. (*d*) Infants also, and feme coverts, who had advowsons by purchase, and not by descent, and were consequently not within the first branch of this act, might take advantage of this second branch, and bring their writs of *quare impedit* within six months. (*e*)

But while the statute thus gave the patron a possessory action to remove the incumbent, in cases in which at common law he was driven to his writ of right, yet it was held, that the statute itself did not revest the right, but only rendered the usurpation voidable by action. (*f*) At length, by statute 7 Anne, c. 18, it was enacted, "that no usurpation upon any avoidance in any church, vicarage, or other ecclesiastical promotion, shall

(*a*) 2 Inst. 356. Boswell's Case, 6 Rep. 48, b. Booth, 121. Stanhope v. Bp. of Linc. Hob. 237, 238. See the cases on this statute collected, Wats. Cler. Law, 132, &c.

(*b*) Stanhope v. Bp. of Linc. Hob. 242. Wats. Cler. Law, 132.

(*c*) 2 Inst. 358. Wats. Cler. Law, 138.

(*d*) See post.

(*e*) Boswell's Case, 6 Rep. 50, b.

(*f*) Boswell's Case, 6 Rep. 50, a. Stanhope v. Bp. of Linc. Hob. 241, or as it seems by presentation, admission, &c. Hob. 242.

Writ of right of advowson.

displace the estate or interest of any person entitled to the advowson or patronage thereof, or turn it to a right, but he or she that would have had a right if no usurpation had been, may present, or maintain his or her *quare impedit*, upon the next, or any other avoidance, if disturbed, notwithstanding such usurpation. And if coparceners, or jointenants, or tenants in common, be seised of any estate of inheritance in the advowson of any church or vicarage, or other ecclesiastical promotion, and a partition is made between them to present by turns, that thereupon every one shall be taken and adjudged to be seised of his or her separate part of the advowson, to present in his or her turn."

By the operation of this statute, and of the statute of West. 2, c. 5, the writ of right of advowson has now become obsolete; and, indeed, there does not appear to be any case in which it can be necessary to resort to it. If an usurpation be suffered, and six months pass, so that the usurper may plead plenarty, and it therefore becomes useless to bring a *quare impedit;* even in this case a writ of right of advowson would be nugatory, for it could not restore the lost presentation, and now, by the statute of Anne, the right is not devested, and consequently on the next vacancy the true patron may present, and, if hindered, bring his *quare impedit.*

It has therefore been thought unnecessary to say any thing more of this writ, than may enable the reader to understand the progress of the law respecting it, and the mode in which it became obsolete.

Writ of right of advowson of tithes.

There is also another writ very similar to the proper writ of right of advowson, called a writ of right of advowson of tithes. Where the incumbent of one patron demands tithes from the incumbent of another patron, and sues him for the same in the spiritual court, the person who is sued may have a prohibition called an *Indicavit*, prohibiting the judges and the party from proceeding. (*a*) The remedy for the tithes in the ecclesiastical court being thus taken away, the patron of the incumbent, who demands the tithes, may have a writ of right of advowson of tithes, if he be seised of the advowson in fee. (*b*) If the patron have only an estate tail, or less estate, he cannot have this writ of right; and in such case his only remedy seems to be by ap-

(*a*) F. N. B. 30 E. 45 B. 2 Inst. 364. (M. 10.)
(*b*) 2 Inst. 364. Com. Dig. Dismes,

pearing in court, on the return of the attachment, and there pleading to the right of the tithes. (*a*) If the right tried be found for the demandant, the cause is remanded to the ecclesiastical court. (*b*) No *Indicavit* will lie, unless the value of the tithes amount to the fourth part of the value of the church. (*c*)

Writ of right of advowson.

Writ of right of dower.

The writ of right of dower is now much disused, not only from its place being generally supplied by the writ of dower *unde nihil habet*, but also on account of the remedy afforded by courts of equity in cases of deforcement of dower. It lies where a woman is endowed of parcel of her dower, and is deforced of the residue in the same town, by the same tenant, by whom she was endowed of part; if any other person be tenant of the residue, or if the land lie in another town, a writ of dower *unde nihil habet* is the proper remedy. (*d*) Whenever dower has been once assigned, the wife cannot afterwards have a writ of right of dower, but, if deforced, must sue on her own possession; and, therefore, if she lose by assize or action tried, her only remedy is by attaint. (*e*) And if she loses the land, which she holds in dower by default, her only remedy is by a *quod ei deforceat*, by the equity of statute West. 2, c. 4, or, if she was not duly summoned, by writ of deceit. (*f*) If the lands be gavelkind, the wife may have a writ of right of dower for the moiety according to the usage. (*g*)

The writ was formerly directed to the heir if he had a court, or if the husband had aliened all his lands in fee, to the feoffee. If the husband had aliened the whole in tail, or for life, it might have been sued in the Common Pleas, on the suggestion, "*quia dominus remisit curiam*," for the reversioner had only a seignory in gross, and could not hold a court: and although the lord in fact did not remit his court, yet the writ, brought in the Common Pleas, was good. (*h*) According to modern practice, the writ may be brought, in the first instance, in the Common Pleas, in the same manner as a writ of right; and even the words *quia dominus remisit curiam* seem to be unnecessary.

(*a*) 2 Inst. 364. Booth, 123.
(*b*) 2 Inst. 364. Burn's Ecc. Law, (Indicavit.)
(*c*) 2 Inst. 364. F. N. B. 45 B.
(*d*) F. N. B. 8 C. Booth, 118. Com. Dig. Dower. (G. 1.) And see post.
(*e*) F. N. B. 8 E. Gilb. on Dower, 369.
(*f*) F. N. B. 8 D. Gilb. on Dower, 368.
(*g*) F. N. B. 8 H.
(*h*) F. N. B. 8 A. B. Gilb. on Dower, 359, &c.

Writ of right of dower.

When the writ was brought in the court of the heir, the demandant might have removed it by tolt into the county court, and by *pone* from thence into the Common Pleas, without shewing cause in the writ. So the tenant, shewing cause, might have removed it out of the lord's court into the Common Pleas by *recordari*. (*a*)

Process, &c.

The process is summons, and grand cape before appearance, and petit cape after appearance. The common essoign lies. But it seems doubtful whether a view can be had. The alienee of the husband, or of his heir, may vouch or pray in aid. Receit lies. No damages or costs are recoverable. There is no time of limitation. (*b*)

(*a*) F. N. B. 7 E. Gilb. on Dower, 358.

(*b*) See post, under the proper heads.

Of Writs in the Nature of Writs of Right.

Writ of right *sur disclaimer.*

If a tenant disclaim upon record to hold his land of his lord, the latter may have a writ of right for recovery of the land, as if the tenant disclaim in a writ *de consuetudinibus et servitiis;* or in replevin, if the lord avow for rent and services, and the tenant disclaim in his bar to the avowry. (*a*) This writ is entirely obsolete.

De rationabilibus divisis.

The writ *de rationabilibus divisis*, which is in its nature a writ of right, lies where two or more persons have lands in different townships or hamlets, one of them being seised of lands in one township, and the other of lands in the other township, and the boundaries of the townships, and of the respective lands are not known. In order to settle these boundaries, a writ *de rationabilibus divisis* may be sued out, which can only be had by a tenant in fee-simple, though it may be brought against tenant for life. Several tenants in common, in one township, may have this right against a tenant in an adjoining township, who must make defence severally against each of the plaintiffs. The plaintiffs then reply, and after reciting their count, and alleging the esplees anew, join the mise with the tenant upon the mere right. (*b*)

The process is summons, attachment, and distress. Summons and severance lies, and a view may be granted. Jointenancy or coparcenery is a good plea, and the writ may be brought against several tenants who hold in severalty, or in common, in one township. (*c*)

This writ, which is now obsolete, may be brought in the county court, and may be removed by the plaintiff, by *pone*, into the Common Pleas. (*d*)

Writ of right of ward.

If a tenant in chivalry died in the homage of the lord, and a stranger entered into the land, or took the body of the heir

(a) Com. Dig. Droit. (F.) Abatement. (F. 15.) Booth, 133. Rast. Ent. 224, a.
(b) F. N. B. 128, 129. Booth, 130. Rast. Ent. 541. Com. Dig. Droit. (L.)
(c) Ibid.
(d) Ibid.

Writ of right of ward.

within age, the lord might have had a writ of right of ward. (*a*) And he might have had it for the land and body together, or for the land or body by itself. (*b*) So a guardian in socage may have a writ of right of ward for the land and body by reason of ward, but it seems that he cannot (*c*) have the writ for the land only, for he is only a bailiff, and has no right to the land. This writ may be sued by justicies in the county, or in C. B. (*d*)

De consuetudinibus et servitiis,

This writ *de consuetudinibus et servitiis*, which is in the nature of a writ of right, lies for the lord in fee, in tail, or for life of a seignory, against a tenant who deforces the lord of his lawful services or rent. It may be brought either in the Common Pleas, or in the county court by justicies. If the writ be brought on the demandant's own seisin, it is in the *debet* and *solet;* if on the seisin of his ancestor, in the *debet* only. If the writ be by tenant in fee of the seignory against tenant in fee of the tenancy, the mise may be joined as in a writ of right. But if brought by tenant for life against tenant in fee, it is questionable how it shall be joined. The tenant may in a court of record disclaim holding of the lord. (*e*) A parson cannot have a writ of customs and services. (*f*) This writ is now entirely obsolete.

Writ of *cessavit*.

The writ of *cessavit*, which is founded upon the doctrine of tenure, lies, first, upon the statute of Gloucester, 6 Ed. 1, c. 4, which gives it to the lord against the tenant in fee, who ceases for two years to pay and perform his fee-farm rent and services (*g*), extended, by the statute of Westminster, 2, c. 21, to other rents and services. (*h*) Secondly, upon the statute of Westminster, 2, c. 41, where land is given for a chantry, light,

(*a*) F. N. B. 139 B. Com. Dig. Gardian. (H. 1.) Booth, 132.

(*b*) F. N. B. 139, C.

(*c*) F. N. B. 139 H. the word "not," is left out in the English translations of the N. B. Com. Dig. ut sup.

(*d*) F. N. B. 139, F. as to ravishment of ward, see Com. Dig. Gardian, (H. 3,) F. N. B. 139 L. 2 Inst. 439.

(*e*) F. N. B. 151. Booth, 132. Rast. Ent. 143, b. Fitz. Ab. Droit. 28. Com. Dig. Droit. (G.)

(*f*) F. N. B. 49, L.

(*g*) 2 Inst. 295, 400. Booth, 731. 3 Bl. Com. 232.

(*h*) 2 Inst. 401, services annual, as rent, suit, and the like, and not homage or fealty. Ibid.

Of *cessavit*.

sustenance of poor people, &c. and the alms are withdrawn for the space of two years, in this case the donor may have a *cessavit* (*a*); but a *cessavit* does not lie unless the land have lain fresh and uncultivated for two years, and there be not a sufficient distress upon the premises, or unless the tenant have so enclosed the land that the lord cannot come upon it to distrain. (*b*)

Not only a lord who is tenant in fee, but tenant in tail, by the curtesy, in dower, or for life, may have a *cessavit*. (*c*) The heir cannot have a *cessavit* for a cesser in the lifetime of his ancestor. (*d*)

The tenant must hold immediately of the lord, otherwise no *cessavit* lies. (*e*) Yet, in case tenant in fee make a lease in tail, or for life, a *cessavit* may be brought against the tenant in tail, or for life, alleging the tenure in the reversioner, (the tenant in fee) and the cesser in the tenant in tail, or for life. (*f*) And if a man make a lease for life, remainder over in fee, or a gift in tail, remainder over in fee, the tenant for life, or in tail, holds of the lord, and a *cessavit* will therefore lie against him. (*g*) But a donor of an estate tail, cannot maintain a *cessavit* against the donee, or a reversioner against his tenant for life, for they are not *lords* within the meaning of the statute. (*h*)

The writ may be brought in the *per*, the *per* and *cui*, or the *post*, like a writ of entry. (*i*) After verdict, and before judgment, or upon the return of the petit cape, and before judgment, if the tenant tender all arrears with damages and find sureties to be approved of by the court, who shall bind their lands to the same services, he may be allowed to do so and retain his lands (*k*), under a conditional judgment that in case he cease for two years again, the tenements shall recur and remain to the plaintiff. (*l*)

The process in *cessavit* is summons and grand cape before appearance, and petit cape after appearance. The defendant may be essoigned. (*m*)

(*a*) 2 Inst. 457. F. N. B. 209 I.
(*b*) 2 Inst. 296. 3 Bl. Com. 232, 3.
(*c*) F. N. B. 209 G. 2 Inst. 401. Co. Litt. 226, b.
(*d*) 2 Inst. 402.
(*e*) 2 Inst. 296.
(*f*) 2 Inst. 401. F. N. B. 208 H.
(*g*) F. N. B. 208 I. 209 E.
(*h*) F. N. B. 208 I. 209 G. 2 Inst. 296, 401.
(*i*) F. N. B. 208 H. 2 Inst. 402.
(*k*) 2 Inst. 297-8.
(*l*) Rast. Ent. 112, a.
(*m*) See post.

Of escheat.

A writ of escheat lies for the lord, when the tenant in fee-simple dies without heir. (*a*) And if the lord dies before suing out a writ of escheat, his heir shall have it. (*b*) And so shall the successor of an abbot, bishop, &c. (*c*) The lord who is tenant in tail, or has only a particular estate in the seignory, as tenant by the courtesy, or in dower, may maintain escheat. (*d*) If tenant in tail, remainder in fee to himself, die without heir, the lord may have a writ of escheat, for the remainder in fee was held of him (*e*); as he may where tenant in fee is disseised and afterwards dies without heir. (*f*) A writ of escheat lies, although the lord accept rent from the tenant in possession. (*g*)

But where tenant in tail dies without issue, a formedon, and not a writ of escheat, is the proper remedy. (*h*) And so where there is tenant for life, remainder in fee to a stranger, and the stranger dies, and afterwards the tenant for life dies, the lord must not bring escheat, for the tenant for life was tenant of the freehold to the lord, and not he in remainder; the lord must therefore bring a writ of intrusion, if a stranger enter on the land after the death of the tenant for life. (*i*) Whenever the tenant dies in the homage, and is such a tenant as might have compelled the lord to avow upon him before the statute of 21 Hen. 8, the lord, on his death without heir, may maintain a writ of escheat; but where, at the time of the death of such person without heir, another person has been admitted into the lord's homage, as if the lord avow for rent upon the disseisor in a court of record, or accept homage or fealty from him, or if the disseisor have died seised, and his heir be in by title, in these cases, as the lord has a good tenant, he cannot maintain a writ of escheat (*k*), and it is a rule that a right for which the party has no remedy but by action to recover the land, is a thing which consists only in privity and cannot escheat. (*l*) It is said in one case, that where the tenant is disseised and dies, the lord by escheat cannot have a writ of escheat, which only lies where

(*a*) F. N. B. 143 T. Com. Dig. Escheat (B. 1.) Booth, 135. Co. Litt. 13, a.
(*b*) F. N. B. 144 D.
(*c*) F. N. B. 144 L.
(*d*) F. N. B. 144 M.
(*e*) F. N. B. 144 A.
(*f*) F. N. B. 144 C.
(*g*) F. N. B. 144 O. Co. Litt. 268, a.
(*h*) F. N. B. 144 A.
(*i*) F. N. B. 144 B.
(*k*) Co. Litt. 268, a. Stanhope v. Bp. of Linc. Hob. 242. Com. Dig. Escheat, (A. 1.) F. N. B. 144 O.
(*l*) Winchester's Case, 3 Rep. 2, b.

Of escheat.

the tenant dies seised, but that he may enter. (*a*) A bare acceptance of rent from the tenant or disseisor will not bar the lord of his writ of escheat, but if he accept rent from the heir or feoffee of the disseisor, where the escheat has accrued before the descent or feoffment, this will be a bar. (*b*) If an annuity, rentcharge or advowson be granted in fee, and the grantor dies without heir, it does not escheat to the lord, for it is not held of him but of the grantor (*c*); and so if a corporation is dissolved, the land does not escheat, but goes to the donor. (*d*) If a man commit felony and is pardoned before attainder, the land does not escheat. (*e*)

The form of the writ of escheat varies accordingly as the tenant dies without heir, or is a bastard and dies without heir, or is attainted of felony. And if the tenant be beheaded for felony, or die after judgment, and before execution, yet the writ shall say, *pro quo suspensus fuit*, it not being material whether he be hanged or not. (*f*)

The process in a writ of escheat is summons and grand cape before appearance, and petit cape after appearance, as in other writs of *præcipe quod reddat*. (*g*)

Of *nativo habendo*.

The writ *de nativo habendo* formerly lay where a villein fled from his lord, and lived out of the manor to which he was regardant; and by this writ the sheriff was authorised to seise him if he did not deny his villeinage (*h*); but if the villein alleged himself to be free, the sheriff could not have seised him, but the lord must have removed the writ by *pone* before the justices in eyre, or into the Common Pleas, where he counted upon it. (*i*) Nor could the sheriff have seised a villein dwelling in the king's ancient demesne, for the writ runs *nisi sit in dominico domini regis* (*k*); nor by the custom of London, in case he had dwelt a year and a day within the city. (*l*)

Upon a *nativo habendo* delivered to the sheriff, before removal by *pone*, the defendant might have sued out a writ *de libertate*

(*a*) Y. B. 32 H. 6, 27, a. But see F. N. B. 144 C. Co. Litt. 268, a.
(*b*) Co. Litt. 268, a.
(*c*) 1 Rol. Ab. 816, l. 27, 30.
(*d*) Co. Litt. 13, b.
(*e*) Smith's Case, Owen, 87. Com. Dig. Escheat, (A. 2.)
(*f*) F. N. B. 144 E, F, G.
(*g*) F. N. B. 144 O.
(*h*) F. N. B. 77 A. Com. Dig. Villeinage. (C. 1.) Booth, 127, and see Somersett's Case, 20 St. Trials, 38, (notes).
(*i*) F. N. B. 77 C, D.
(*k*) F. N. B. 77 E. Co. Litt. 137, b.
(*l*) Moor, 2.

Of *nativo habendo.*

probandâ, whereupon the whole was removed before the justices in eyre (*a*); and after such removal, nothing was done in the *libertate probandâ*, but the lord counted upon the *nativo habendo*. (*b*) By statute 25 Ed. 3, c. 18, the lord was authorised to seise his villein although there was a writ *de libertate probandâ* pending. (*c*)

The writ of *nativo habendo* was not brought against any person in certain, for no one could oust the lord of his possession of his villein. (*d*)

Of *quo jure.*

This writ lies for a man who has lands in fee, in which another claims common, and by it the commoner who claims the common is commanded to shew *by what right* he demands common of pasture in the lands of the plaintiff, as the plaintiff has no common in the land of the defendant, neither does the said defendant service to him for which he ought to have common in the land of him the said plaintiff. (*e*)

This is a writ of right in its nature, for when the plaintiff has declared, the defendant makes defence, and sets out his title to the common, and alleges seisin thereof and the esplees, and that such is his right he offers, &c. as the demandant does in a writ of right. The plaintiff in the *quo jure* then makes defence, and denies the seisin alleged by the defendant, and joins the mise upon the mere right. (*f*) The tenant thus becomes an actor, as in a *ne injuste vexes.*

A *quo jure* lies against several tenants, who must make several defences and titles, and join the mise severally. Summons and severance lies in it, and a view may be granted. The process is by summons, attachment, and distress; and by grand distress in lieu of a petit cape for default after appearance. (*g*)

This writ is now obsolete, being superseded by the action of trespass.

Of *secta ad molendinum.*

A writ of *secta ad molendinum* lies where a man by usage, time out of mind, has been accustomed to grind his corn at the mill of the plaintiff, and afterwards withdraws his suit to the plaintiff's mill, and does suit to the mill of another. (*h*) And a lord

(*a*) F. N. B. 77 C.
(*b*) F. N. B. 77 D, G.
(*c*) F. N. B. 77 C.
(*d*) Co. Litt. 306, b.
(*e*) F. N. B. 126 F, G. Booth, 129. Com. Dig. *quo jure.*
(*f*) F. N. B. 128 L. Rast. Ent. 539, a, b.
(*g*) F. N. B. 128 K.
(*h*) F. N. B. 124 M. Com. Dig. Droit. (H.) Booth, 137.

may have this writ against his free tenants who hold of him to do suit at his mill, although he may distrain for such suit, for it lies as well by prescription against resiants as by tenure against tenants. (*a*)

Of *secta ad molendinum.*

The writ may either be brought in the county court by justicies, or in the Common Pleas, and the process is summons, attachment, and distress infinite, and for default after appearance, a *distringas* in the nature of a petit cape. (*b*) If the plaintiff himself has been seised of the suit, it is brought in the *debet* and *solet* on his own possession, otherwise in the *debet* only, which savours of the mere right. (*c*) Tenant in tail, for life, or in dower, may have the writ in the *debet* and *solet*. (*d*) A view may be had of the mill at which the suit is to be done (*e*); but no voucher lies (*f*), although aid may be prayed. (*g*) The writ of *secta ad molendinum* is now superseded by the action on the case. (*h*)

Of *ne injuste vexes.*

In early times, lords were frequently accustomed to oppress their tenants by distraining upon them for greater services than they could be required by law to perform; to remedy which abuse the writ of *ne injuste vexes* was provided, by which the lord was prohibited from unjustly vexing his tenant in the freehold which he held of him, and from exacting customs and services which he was not bound to perform. (*i*) This writ lay at common law (*k*) before the statute of *Magna Charta*, c. 10, by which it is enacted, that no man shall be distrained to do more service for a knight's fee, nor any freehold than therefore is due. If the lord encroach more rent of the same nature by the voluntary payment of the tenant himself, the latter cannot avoid this encroachment in an avowry, though he may in an assise, *cessavit*, or *ne injuste vexes*, and a successor or issue in tail, may avoid it in an avowry. If the service encroached be of another nature, the tenant may avoid it in an avowry; and if an encroachment of the same nature be by coercion of distress, the tenant may also avoid it in an avowry. (*l*) Where the encroach-

(*a*) Ibid.
(*b*) F. N. B. 123 A, D.
(*c*) F. N. B. 123 B. Booth, 138.
(*d*) Co. Litt. 326, b. F. N. B. 123 B.
(*e*) Id. C.
(*f*) Fitz. Ab. Voucher, 116.
(*g*) Hale's note. F. N. B. 123 D (*a*).
(*h*) See post.
(*i*) F. N. B. 10 C.
(*k*) Glanv. l. 12. c. 9, 10. 2 Inst. 21. Com. Dig. Droit. (I.)
(*l*) Bevil's Case, 4 Rep. 11, b. 2 Inst. 21.

Of *ne injuste vexes.*

ment is made upon a tenant in tail, or tenant for life, who cannot maintain a *ne injuste vexes*, he may have an action upon the above chapter of *Magna Charta*. (*a*) A tenant in tail, though he cannot have a *ne injuste vexes*, is not estopped by the payment and seisin had by the hands of his ancestor, but by a seisin by his own hands, he is bound for his own time. (*b*) This writ may be maintained *quia timet* before distress or molestation. (*c*)

The process in this action is attachment and distress against the lord, returnable in the Common Pleas or King's Bench. When the lord appears upon the attachment the tenant counts against him, upon which count the defendant (the lord) makes defence, and defends the wrong and force, &c. and pleads in nature of a count against the plaintiff; whereupon the plaintiff defends this count, and may put himself upon the grand assise. Judgment final may be given in this writ after the mise joined upon verdict against either of the parties; or if either of them be nonsuit, or make default after the mise joined. (*d*)

Of mesne.

The writ of mesne is now quite obsolete, but as the law relating to this subject may still be found collaterally useful, it is shortly stated. The writ of mesne results from the obligation of the tenure between the tenant paravaile and the lord mesne, by which, when the services due from the former to the latter, are equal to the services due from the latter to the lord paramount, and the lord paramount distrains upon the tenant for the services of the mesne in arrear, the tenant is entitled to recover damages from the mesne. (*e*) This obligation arises from the equality or *owelty* of the services, but there may be other causes of acquittal, as where the tenant holds in frankalmoign or frankmarriage, by homage ancestral, or in dower. These are implied acquittals, and there may likewise be express acquittals, either by fine or deed, at or after the creation of the tenure, or by an acknowledgment in a court of record. (*f*) Tenant for life remainder over in fee, may maintain a writ of mesne against the mesne lord, for he holds immediately of him. (*g*)

The writ is maintainable where the tenant has not been distrained, in the nature of a writ *quia timet*, and judgment shall be

(*a*) 2 Inst. 21. F. N. B. 10, 11. A parson cannot have a *ne injuste vexes*. F. N. B. 49 L.
(*b*) F. N. B. 11 D. Co. Litt. 326, b.
(*c*) Co. Litt. 100, a.
(*d*) F. N. B. 10 H. 11. Booth, 126. Rast. Ent. 437, b.
(*e*) F. N. B. 135 M.
(*f*) F. N. B. 136 B, D. 2 Inst. 373.
(*g*) F. N. B. 136 G.

given that the plaintiff recover his acquittal, but he cannot have damages. (*a*)

Of mesne.

The process at common law was summons, attachment, and distress infinite; but by stat. Westminster, *2*, c. 9, if the mesne do not appear at the return of the grand distress, he shall be forejudged; that is, he shall lose the services of his tenant in respect of the tenements which he held of him. (*b*)

Of dower *unde nihil habet.*

The writ of dower *unde nihil habet* is a writ of right in its nature, and lies where a woman marries a man who is sole seised of lands or tenements to him and his heirs in fee-simple, or to him and the heirs of his body, &c.; or where the husband during the marriage was sole seised in fee-simple or fee-tail of such estate, that the issue begotten between him and his wife may inherit the same; in these cases, whether the husband alien such lands or tenements, and die, or die seised, or be disseised and die, his widow may have a writ of dower *unde nihil habet* against the tenant of the freehold. (*c*) Dower *unde nihil habet* does not lie where the wife has been endowed of part of her dower, in the same vill, by the person who ought to be tenant in the writ of dower *unde nihil habet*, for in that case, her remedy is by writ of right of dower (*d*); but where a man is seised of four acres of land in one town, and takes a wife and leases one acre for the life of the lessee, and has issue and dies seised of the three acres, and the heir enters and endows his mother of those three acres, and the lessee for life dies, and the heir enters into the fourth acre as in his reversion; in this case the wife may have a writ of dower *unde nihil habet* of the acre which was in lease, because the heir was not tenant of the freehold of that acre at the time when he endowed his mother of the other three acres. (*e*)

Dower *unde nihil habet* lies as well for dower at common law, as where the wife has been endowed *ad ostium ecclesiæ*, or *ex assensu patris*. (*f*) And as well where the husband was seised in law as where he had actual seisin. (*g*)

If the husband have lost the lands by *reddition* or default, the

(*a*) F. N. B. 136 E. Co. Litt. 100, a. And see post, title "Damages."
(*b*) 2 Inst. 374. Booth, 137.
(*c*) F. N. B. 147 E. Booth, 166. Gilb. on Dower, 374.
(*d*) Stat. West. 2, c. 49. 2 Inst. 262. F. N. B. 8, c. See ante, p. 29. Gilb. on Dower, 367.
(*e*) O. N. B. 9, a. 2 Inst. 262.
(*f*) O. N. B. 9, b. F. N. B. 148 A.
(*g*) O. N. B. 11, b. Co. Litt. 31, a.

Of dower *unde nihil habet.*

right being in him, the wife may still bring her writ of dower (*a*); but, if the wife, after the husband's death, lose by default the lands which she held in dower, she must bring a *quod ei deforceat.* (*b*)

The writ of dower lies, as it has been said, to be endowed of lands, advowsons, villeins, common of pasture, and other profits or liberties, in which the husband had any estate of inheritance, which the issue of the marriage by possibility might inherit. (*c*) So it lies of the third part of the profits of an office (*d*), and of the third part of the profits of a mill, &c. (*e*) but it does not lie of estovers. (*f*)

The writ must be brought against the tenant of the freehold, and, if the demandant is unable to discover who is tenant, a discovery may be had by a bill in equity. (*g*) The writ may be sued in the county court by *justicies*, and the writ for dower of lands or tenements in London must be directed to the mayor and sheriffs. (*h*)

The process is summons and grand cape before appearance, and petit cape after appearance. The common essoign lies. It seems that no view can be had; voucher and aid prayer lie for the alienee of the husband or of the heir, and receit lies. Damages are recoverable if the husband died seised, and, if damages, costs also. There is no time of limitation. (*i*)

Although courts of equity have in modern times afforded a remedy in cases of deforcement of dower, which has caused this writ to fall into partial disuse, yet, as those courts will not interfere where the title of the dowress is disputed, this action cannot be considered as obsolete. (*k*)

Of *quod permittat.*

This writ, which is now entirely superseded by the action on the case, lies for a disturbance to a right of common, whether of pasture, turbary, or piscary (*l*), for a disturbance to easements

(*a*) Stat. W. 2, c. 4. 2 Inst. 349, 50. Perk. s. 376, and see further, as to falsifying recoveries had against the husband, Park on Dower, 145.

(*b*) F. N. B. 8 D.

(*c*) F. N. B. 148 C.

(*d*) F. N. B. 8 K. Hale's note, ibid. (b).

(*e*) Perk. s. 342. Hale's note, *ubi sup.*

(*f*) O. N. B. 11, a. Perk. s. 341.

(*g*) Kemp v. Risbie, Toth. 84.

(*h*) F. N. B. 148 B, D. Gilb. Dower, 378.

(*i*) See further, under the proper heads.

(*k*) Curtis v. Curtis, 2 Br. Ch. Cases, 631, 633. Mundy v. Mundy, 2 Ves. Jun. 128. Park on Dower, 283, 329.

(*l*) F. N. B. 123 F, L. Booth, 237. Com. Dig. *Quod perm.* (A.) Vin. Ab. *Quod permittat.*

Of *quod permittat.*

as a right of way (*a*); the right of erecting ladders on the soil of another, for repairing a house contiguous (*b*); the right of drawing water from a well (*c*); a freefold (*d*); and a corody (*e*); and also for disturbing a person in doing suit to a mill. (*f*)

A *quod permittat* lay at common law for profits *à prendre*, which consisted in *capiendo, colligendo, habendo, recipiendo, et exercendo*, for which no *præcipe quod reddat* could be sustained. (*g*) Thus, a *quod permittat* lay for reasonable estovers (*h*); but, as the statute of West. 2, c. 25, gave an assise in these cases, it seems that a *quod permittat* is taken away. (*i*) Nor does a *quod permittat* lie for an office, for which a *præcipe quod reddat* is sustainable at common law. (*k*)

A *quod permittat* lies for a nuisance, as for building a house or wall, which is a nuisance to the freehold of the plaintiff (*l*), and also for setting up a fair or market to the injury of the plaintiff's fair or market. (*m*)

According to the nature of the injury done, a *quod permittat* is said to be in the nature of a writ of right, of a writ of entry, or of a *mortd'ancestor*. If the writ run, "that he permit B. to have common of pasture in N., as he *ought* to have," or be in the *debet*, as it is called, the possession is not put in issue, and the defendant may join the mise on the mere right (*n*); but, if the writ be brought in the *debet* and the *solet*, "that he permit B. to have common of pasture in N., which he *ought*, and *has been used to have*," it is then brought on the plaintiff's own possession, and is said to be in the nature of a writ of entry, in which the mise cannot be joined on the mere right. (*o*) There is, also, another form of a *quod permittat* in the nature of a *mortd'ancestor*, where the disturbance was done to any ancestor of the plaintiff, within the degrees within which a *mortd'ancestor* lies. (*p*)

It appears, therefore, that a *quod permittat* lies for the heir of the person to whom the nuisance, &c. was done; and so it lies

(*a*) F. N. B. 124, a.
(*b*) Ibid.
(*c*) Ibid.
(*d*) Ibid.
(*e*) Ibid.
(*f*) Ibid.
(*g*) 2 Inst. 411.
(*h*) Reg. 155, a.
(*i*) 2 Inst. 412. F. N. B. 124 A, but see Fitz Ab. *Quod perm.* 9. Rast. Ent. 339, a. Booth, 237.
(*k*) Jehu Webb's Case, 8 Rep. 47, b. 2 Inst. 412, and see ante, p. 18.
(*l*) F. N. B. 124 H.
(*m*) F. N. B. 125 A.
(*n*) Reg. 156, a. F. N. B. 124 A. Booth, 238.
(*o*) Reg. 156, a. F. N. B. 124 C. note (*a*).
(*p*) F. N. B. 123 K.

Of *quod permittat.*

against the heir of him who did the nuisance, &c. (*a*); and a parson may have a *quod permittat* on the seisin of himself or his predecessor. (*b*) A feoffee of the land to which the nuisance is done may have a *quod permittat* against the feoffee of the land on which the nuisance is done, if the latter does not abate it after demand. (*c*) Tenant in tail may have a *quod permittat.* (*d*) The writ ought to be brought against the tenant of the freehold, though the disturbance was done by a stranger who was not tenant of the soil. (*e*)

This writ may be brought either in the Common Pleas or in the county court by *justicies.* (*f*) The process is summons, attachment, and *distringas*; and, if upon the summons, the sheriff returns *nihil,* a *capias* may issue. (*g*) A view by the jury may be had in this writ (*h*), but no voucher lies. (*i*)

(*a*) Reg. 156, a. F. N. B. 124 H. Rast. Ent. 538, b.

(*b*) Fitz. Ab. Q. P. 8. F. N. B. 123 L. 50 H.

(*c*) F. N. B. 124 H. Penruddock's Case, 5 Rep. 100, b.

(*d*) F. N. B. 124, b.

(*e*) F. N. B. 124 E. Palmer v. Poultney, 1 Salk. 458.

(*f*) F. N. B. 123 G.

(*g*) F. N. B. 124 F.

(*h*) F. N. B. 123 G, margin. Palmer v. Poultney, 1 Salk, 458.

(*i*) 2 Rol. Ab. 745, l. 15.

Of the Writ of Formedon.

Of *formedon*.

Discontinuance.

As it is only necessary to resort to a writ of *formedon* when an estate tail is discontinued, it will be proper to inquire with some particularity into the nature of discontinuance, as it affects the estate of tenant in tail. A discontinuance is defined by Sir Edward Coke to be an alienation made or suffered by tenant in tail, or by any that is seised in *auter droit*, whereby the issue in tail, or the heir or successor, or those in reversion or remainder, are driven to their action, and cannot enter. (*a*) It is essential to every discontinuance that there should be a divesting of an estate, and that the same should be turned to a right; for, if it be not turned to a right, the owner of the estate cannot be driven to an action. (*b*) It is a necessary consequence of this doctrine, that when an estate tail is discontinued, the reversion or remainder depending upon such estate tail should also be discontinued. (*c*) The true notion of a discontinuance, observes Lord Hardwicke, is this: the particular estate, and all the remainders over constituting but one estate, if the particular estate be hurt, the residue of the fee, as subsisting upon that, must suffer likewise, and thence we say, all the remainders are discontinued, because the chain of interests, which are carved out of the fee, and which depend upon one another, is broken. (*d*) Whenever, therefore, an estate tail is discontinued, the issue in tail is compelled to resort to his writ of *formedon* in descender, and the reversioner or remainder man to his *formedon* in reverter or remainder.

Must be by tenant in tail in possession.

In order to create a discontinuance, it is necessary that the tenant in tail should be seised of an estate tail in possession at the time of the discontinuance made, unless in the particular case of a discontinuance by the operation of a warranty. Thus, if there be tenant for life, the remainder in tail, and he in remainder enters upon the lessee for life, and disseises him, and

(*a*) Co. Litt. 325, a.
(*b*) Co. Litt. 327, b.
(*c*) Co Litt. 325, a. Litt. s. 625.
(*d*) Berrington v. Parkhurst, 13 East, 493.

Of *formedon.*

Discontinuance.

makes a feoffment: this is not any discontinuance, because the feoffor was not seised by force of the entail. (*a*) But, if there be lessee for years, remainder in tail, and he in remainder enters upon the lessee for years, and makes a lease for life, or feoffment in fee, this is a discontinuance, for he was seised by force of the entail at the time of the feoffment (*b*), the possession of the tenant for years being his possession. And, if there be grandfather, father, and son, and the grandfather is seised in tail, and the father disseises the grandfather, and makes a feoffment in fee, and dies, this creates no discontinuance, because the father was not possessed of the entail, but of the fee-simple by disseisin, which is subject to the entry of the tenant in tail, and consequently, the alienee is subject to the entry of the issue in tail, inasmuch as the father, who made the alienation, had only the naked possession by disseisin, and not the right of possession by virtue of the entail. (*c*) It appears, therefore, that if the person making the alienation be seised of an estate tail in reversion or remainder merely, this is no discontinuance. (*d*) Thus, if tenant in tail makes a lease for his own life, and afterwards levies a fine, this is no discontinuance, for it only passes the reversion expectant upon the estate of freehold. (*e*) So in a late case, it was held, that where A. took an estate for life, remainder to trustees to preserve contingent remainders, remainder to A. in tail, he could not, when in possession, under his life estate, discontinue the estate tail, by granting a lease for lives with livery of seisin. (*f*)

Nor will the alienation of tenant in tail not in possession work a discontinuance, although the tenant of the freehold join in the conveyance. Thus, if tenant for life, and the first remainder man in tail levy a fine, this is no discontinuance, for each party passes only what he lawfully may (*g*); and so, if tenant for life, and remainderman in tail join in a feoffment by deed, this is no discontinuance, for it is the livery of tenant for life, and the

(*a*) Litt. s. 658. Co. Litt. 333, b. 347, b. 1 Rol. Ab. 634, l. 30, but see Batty v. Trevillion, Moor, 281.

(*b*) 1 Rol. Ab. 634, l. 35. Darrel v. Stukeley, And. 130.

(*c*) Litt. s. 637, 641. Gilb. Ten. 126.

(*d*) Co. Litt. 347, b. Driver v. Hussey, 1. H. Bl. 269. Peck v. Channel, Cro. Eliz. 827.

(*e*) Co. Litt. 332, b.

(*f*) Doe dem. Jones v. Jones, 1 B. and C. 238.

(*g*) Bredon's Case, 1 Rep. 76, a. Peck v. Channel, Cro. Eliz. 827. Owen, 129, S. C. Trevilian v. Lane, Cro. Eliz. 56, and see 3 Prest. Convey. 410.

Of *formedon.*

Discontinuance.

grant of him in remainder, and grant without warranty is no discontinuance (*a*); but, unless the feoffment be by deed, it is said to operate as the surrender of tenant for life, and the feoffment of tenant in tail (*b*), in which case such a conveyance would seem to work a discontinuance. It is said, in Stephens v. Brittredge (*c*), that the case put in Bredon's case that the feoffment of tenant for life, and of him in remainder in tail, was no discontinuance had been often denied, and that it had been adjudged in Baker and Hacker's case, by Brampston, C. J., and his companions, that it was a discontinuance, because it is of another nature than a fine. The case of Baker and Hacker, (Hacking) (*d*), is by no means an authority for this position. In that case, tenant in tail, and reversioner in fee, joined in a feoffment, which was held to be a discontinuance. The feoffment of tenant in tail alone would have operated as a discontinuance, which was not prevented by the mere joinder of the reversioner. In Stephens and Brittredge, however, the tenant in tail could not have discontinued alone, because he was not tenant in tail in possession.

But, where an estate tail is limited to husband and wife, and the heirs of the body of the husband, and the latter makes a feoffment in fee, this creates a discontinuance, for the estate tail is executed *sub modo* for that purpose. (*e*)

Though feoffments and grants by tenants in tail not seised in possession by force of the entail do not work a discontinuance, yet they are good against the feoffors and grantors during their lives. (*f*)

Modes of discontinuing.

There are several different modes by which a discontinuance may be effected. 1. By alienation in fee. 2. By alienation in tail, or for life, which is a discontinuance in tail, or for life only. 3. By an alienation for life, and subsequent conveyance of the reversion executed in the life of tenant in tail, which is a discontinuance in fee. 4. By operation of a warranty. The different conveyances by which a discontinuance may be created are five. Feoffment, fine, common recovery, and release and confirmation, with warranty. (*g*)

(*a*) Br. Ab. Discon. de pos. 38, Bredon's Case, 1 Rep. 76, b. Co. Litt. 302, b.

(*b*) Bredon's Case, 1 Rep. 77, a. Co. Litt. 302, b. Treport's Case, 6 Rep. 15, a.

(*c*) 1 Sid. 83.

(*d*) Cro. Car. 387, 405. Hutt. 126, S. C.

(*e*) King v. Edwards, Cro. Car. 320. 1 Rol. Ab. 632, l. 46. Fearne Cont. Rem. 36.

(*f*) Hawk. Co. Litt. 436, 7th edit.

(*g*) Co. Litt. 325, a.

Of *formedon.*

Discontinuance. I. By alienation in fee. *Feoffment.*

If tenant in tail make a feoffment in fee, this is a discontinuance by force of the livery of seisin, by which a fee-simple passes. (*a*) One of the reasons why the issue in tail in this case is barred of his entry, and put to his action, is said to be, because feoffments in ancient times had always a warranty annexed to them. Now, in case of an entry upon the alienee, he cannot take advantage of his warranty by voucher, as there is no action brought against him, and consequently he cannot vouch, and he is, therefore, in that event, driven to his writ of *warrantia chartæ.* But, by compelling the issue in tail to bring his action against the alienee, the latter has all the benefits of his warranty without going to the expense of getting his judgment in a writ of *warrantia chartæ.* (*b*) But, where tenant in tail in possession enfeoffs the donor, this does not create a discontinuance (*c*), but this must be understood of a reversion *immediately* expectant on the estate of the donee, and of a feoffment made to the donor alone. (*d*) The reason of this feoffment not operating as a discontinuance is, that it acts as a surrender, and therefore passes no more than it lawfully may. (*e*) Though the tenant in tail may likewise have the remainder in fee in him, yet, if he make a feoffment in fee, it will be a discontinuance (*f*), and so where the immediate reversioner joins with the tenant in tail in making the alienation, the mere concurrence of the reversioner will not prevent a discontinuance, either with respect to the estate tail or the reversion. (*g*)

If tenant in tail make a lease for life, the remainder in fee, this is an absolute discontinuance, although the remainder is not executed in the life of tenant in tail, because the whole is one estate, and passes by one livery. (*h*)

Fine and recovery.

A discontinuance may be created by a fine executed as a fine *sur conusance de droit come ceo, &c.*, but not by a fine executory, as a fine *sur conusance de droit tantum*, or *sur done, grant, & render*, before execution. (*i*) A fine, either with or without (*k*)

(*a*) Litt. s. 599.

(*b*) Co. Litt. 327, a. Gilb. Ten. 117.

(*c*) Litt. s. 625. Dyer, 12, a.

(*d*) Co. Litt. 334, b. 335, a. Cludleigh's Case, 1 Rep. 140, a. 1 Rol. Ab. 634, l. 1.

(*e*) Gilb. Ten. 122.

(*f*) 1 Rol. Ab. 633, l. 6. Baker v. Hacking, Cro. Car. 405.

(*g*) Per 3 Justices, Croke contr. in Baker v. Hacking, Cro. Car. 387, 405. Mr. Butler's note to Co. Litt. 335, a (2).

(*h*) Co. Litt. 333, b. Br. Ab. Discont. de pos. 1, 3.

(*i*) Br. Ab. Discontin. de poss. 2. Co. Litt. 332, b. 1 Rol. Ab. 632, l. 44. Shep. Touch. 4, but quære of a fine executory levied to uses, Pigot. 49.

(*k*) Odiarne v. Whitehead, 2 Burr. 714.

proclamations, will create a discontinuance. A common recovery creates a discontinuance (*a*), for every recoverer recovers a fee-simple. (*b*)

Of *formedon.*

Discontinuance.

An exchange creates no discontinuance, for there is no livery (*c*), nor a devise (*d*), nor a grant without livery (*e*), nor a bargain and sale enrolled. (*f*) But, where a tenant in tail conveys by bargain and sale, by lease and release, or by covenant to stand seised to the use of another in fee, and dies, a base fee passes by the conveyance, and the estate continues until it is avoided by the entry of the issue in tail. (*g*) Though the statute *de donis* prevents the tenant in tail from aliening the estate by these conveyances, so as to bar his issue, yet it does not prohibit him from parting with the whole estate, subject to the right of the issue. Where tenant in tail, by bargain and sale, &c. has conveyed a base fee, and has afterwards, and after enrolment, levied a fine, such fine, although it extinguishes and bars the estate tail, does not enlarge the estate of the alienee. It prevents the entry of the issue in tail, but not of him in remainder or reversion. (*h*) But, if the fine be levied before the bargain and sale is enrolled, it will operate as a discontinuance, because the estate will be held to pass by the fine, and not by the bargain and sale. (*i*) And, where the fine is levied in pursuance of a covenant in a prior conveyance of an estate tail, as when tenant in tail conveys by lease and release, and covenants in the release to levy a fine, which is done accordingly, the lease and release, and fine, will be considered as one conveyance, and will operate as a discontinuance of the estate tail. (*k*)

Alienations in fee, not creating a discontinuance.

Nothing which lies in grant can be discontinued, though the conveyance be by fine. (*l*) The term discontinuance is used to distinguish those cases when the party, whose freehold is ousted, can restore it by action only, from those in which he can restore it by entry. Now, things which lie in grant cannot be either devested or restored by entry. The owner, therefore, of any

(*a*) Co. Litt. 325, a.
(*b*) Hunt v. Bourne, 1 Salk. 340.
(*c*) Br. Ab. Discon. de pos. 5.
(*d*) *Ibid.* Litt. s. 624.
(*e*) Br. Ab. Disc. de pos. 35.
(*f*) Seymor's Case, 10 Rep. 95, b.
(*g*) Machell v. Clarke, 2 Ld. Ray. 782.
(*h*) Seymor's Case, 10 Rep. 96, a. Heywood v. Smith, 1 Bulstr. 162. Gilbert's Uses, 101, 3rd edit. Prest. Shep. Touchs. 33.
(*i*) Seymor's Case, *ubi sup.* Hynde's Case, 4 Rep. 70, b.
(*k*) Odiarne v. Whitehead, 2 Burr. 704. Hurd v. Fletcher, Doug. 45. 1 Saund. 260, a. note, (1).
(*l*) Co. Litt. 332, b.

Of formedon.

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thing which lies in grant, has in no stage, and under no circumstances, any other remedy than by action, consequently the distinction in question can never be applicable to him. There may, however, be a discontinuance at election of incorporeal hereditaments. (*a*)

II. By alienation for life or in tail.

Where tenant in tail leases for the life of the lessee, or makes a feoffment in tail, these are discontinuances only during the continuance of the wrongful estates, and when the tenant for life dies, or the second tenant in tail dies without issue, the issue of the first tenant in tail may enter. (*b*)

A tenant in tail may lawfully alien his estate for his own life, and if, after such lease for life, he release to the lessee and his heirs all the right which he has in the lands, this will be no discontinuance. (*c*) It is added by Littleton, that in this case the estate of the tenant of the land is not enlarged by force of the release, for that when the tenant had the estate in the land for term of the life of the tenant in tail, he had then all the right which the tenant in tail could lawfully grant, or release, so that by this release no right passes, inasmuch as the right was gone before. Upon this passage Sir Edward Coke remarks, that the meaning of Littleton is, that having regard to the issue in tail, and to them in reversion or remainder, tenant in tail cannot lawfully make a greater estate than for the term of his own life, and that therefore this release or grant is no discontinuance. But with regard to himself, the release or grant leaves no reversion in him, but puts the same in abeyance, so that after his release or grant made, he shall not have any action of waste, &c. (*d*)

The correctness of the passage in Littleton has been frequently questioned (*e*) and is now held not to be law. Nor is the commentary of Sir Edward Coke correct with reference to the point of abeyance. When a tenant in tail leases for his own life, as he lawfully may, a rightful reversion in tail is vested in him. This reversion also he may lawfully grant during his own life, for he is during that time entitled to the services of the tenant for life. (*f*) The release then of all his right operates as the conveyance of a base fee determinable on the death of the

(*a*) Mr. Butler's note, Co. Litt. 332, a (1).
(*b*) Litt. s. 630.
(*c*) Litt. s. 612.
(*d*) Co. Litt. 331, a.
(*e*) By Lord Hobart, in Sheffield v. Ratcliffe, Hob. 338, and by Lord Holt, in Machell v. Clarke, 2 Salk. 619.
(*f*) Cholmley's Case, 2 Rep. 51, a.

Of *formedon.*

Discontinuance.

tenant in tail and entry of the issue. (*a*) The tenant in tail has consequently no reversion left in him, and can neither bring an action of waste, nor enter for a forfeiture. (*b*) The alienee is seised of a base fee descendible to his heirs, out of which his wife is dowable during the continuance of the fee, and until the entry of the issue in tail. (*c*)

By statute 32 Hen. 8, c. 28, tenants in tail in their own right, may bind their issue in tail, but not those in reversion or remainder, by leases for three lives or twenty-one years, observing the requisites of the statute, and such leases will not be a discontinuance. (*d*)

III. By alienation for life, and subsequent conveyance of the reversion, executed in the lifetime of tenant in tail.

Where tenant in tail in possession leases to another for the life of the lessee, this, as it has been shewn, is only a discontinuance for the life of the lessee, during which period the tenant in tail enjoys a wrongful reversion in fee. If this reversion is granted to a third person, and the tenant in tail dies, living the lessee for life, and then the lessee for life dies, the discontinuance is determined. But if the lessee for life dies in the lifetime of tenant in tail, whereby the reversion is executed, a discontinuance in fee is created. (*e*) This will also be the case if the lessee for life, living the tenant in tail, surrenders to the grantee of the reversion, or if the latter recovers in an action of waste, or enters for a forfeiture. (*f*) And when tenant in tail leases for the life of the lessee, and afterwards releases to him and his heirs all his right, this is a discontinuance in fee, because the reversion is executed in the lifetime of the tenant in tail, and the tenant for life becomes seised of the wrongful fee in possession. (*g*) In these cases, however, it is necessary, in order to make a discontinuance, that the grantee of the reversion should be *in* by the grant of the tenant in tail, for if tenant in tail makes a lease for life and then grants the reversion in fee, and the grantee of the reversion grants it over, and the tenant for life dies, so that the reversion is executed in the lifetime of the tenant in tail, yet this is no discontinuance. (*h*) It is also necessary, that the

(*a*) Machell v. Clarke, 2 Salk. 619, 2 L. Raym. 782.

(*b*) Co. Litt. 331, a.

(*c*) Cally's Case, 24 Ed. 3. 28, b. Fitz. Ab. Dower, 98. Br. Ab. Dower, 58. Seymor's Case, 10 Rep. 96, a. 1 Saund. 261, a, note (3). Park on Dower, 145.

(*d*) Horton v. Bole, Vaugh. 383. For the requisites of leases under this statute, see Co. Litt. 44, a and b. Prest. Shep. Touch. 277, and Bacon's Abridgm. Leases, (D).

(*e*) Litt. s. 620, 622.

(*f*) Litt. s. 621. Co. Litt. 333, b.

(*g*) Co. Litt. 333, b. Br. Ab. Discont. de pos. 3.

(*h*) Co. Litt. 333, b.

Of *formedon.*

Discontinuance.

alienee should be seised of a fee-simple, executed in possession, in the lifetime of the tenant in tail. Thus, if tenant in tail makes a lease for the life of the lessee, and then releases to him and his heirs, this is an absolute discontinuance, for the fee-simple is executed in the lifetime of tenant in tail. But, if B. tenant in tail, makes *a gift in tail to* A., and then releases to A. and his heirs, and afterwards A. dies without issue, the issue of B. may enter, "Because," says Sir Edward Coke, "B. had not seisin and execution of the reversion of the land in his demesne as of fee." (*a*) As the estate tail could not merge in the fee, the fee-simple was never executed in possession in A.

The principle upon which these cases rest appears to be this: that the tenant in tail can exercise his power of discontinuing his estate in his lifetime only. When he leases for the life of the lessee, he creates a discontinuance for life only, and, unless by some further act, executed in his lifetime, he creates a discontinuance in fee, the issue upon the death of tenant for life may enter. The simple conveyance of the reversion by grant, which is a rightful conveyance, is no discontinuance; but, if that conveyance be executed in the lifetime of the tenant in tail, it is then the same in its result as an immediate conveyance of the fee by feoffment. (*b*) The following is the explanation of this doctrine given by C. B. Gilbert." Tenant in tail has the right of possession inheritable, and, therefore, he may discontinue the same in fee by his feoffment, because, since he has an inheritable possession, it follows, of consequence, that he may alien it without any disseisin to any person; but, if he only makes a lease for life, he executes but part of his power, for, since he had a possession inheritable, he, from that possession, has privilege to alien without disseisin to any one; and, therefore, after such lease for life he grants the reversion in fee, and tenant for life attorns, and after tenant for life dies, and the grantee of the reversion enters in the life of tenant in tail, this is a discontinuance of the fee, for, since he had originally an inheritable possession, this is an execution of the farther remaining part of his power, and amounts to an alienation of the fee by a second feoffment, for having originally an inheritable possession, he might discontinue the same in fee, and, when he executes but part of his power, the rest remains in him, and, therefore, if he

(*a*) Co. Litt. 333, b.

(*b*) Co. Litt. 333, b. Gilb. Ten. 121.

has afterwards opportunity in his life, he may execute it by a second alienation." (*a*)

Discontinuance. IV. By release or confirmation, with warranty.

A feoffment, either with or without warranty, made by tenant in tail is a discontinuance; but, a release or confirmation is not, as they are innocent conveyances, and transfer no estate by wrong; but, where a warranty is added to a release, or confirmation, to a disseisor, &c. it will work a discontinuance if it descend upon him who has the right. (*b*) The operation of a warranty in this case is thus explained by Chief Baron Gilbert. "A release with warranty works a discontinuance, for, at common law, the warranty was a voluntary covenant of the force of a feudal contract, and repelling the warrantor from claiming the land, and obliging him to defend it. And, though the statute takes away the force of such covenants, that they shall not bar the issue, yet the issue must claim in the manner the statute prescribes, viz. by action, and, therefore, it works a discontinuance, since in such case the issue cannot recontinue but by action only." (*c*) If the issue were allowed to enter without bringing an action, the warranty could not be pleaded, and the effect of it by way of voucher would be lost; in order, therefore, that in case assets in fee-simple descend, the releasee may plead the same, and bar the demandant, it has been held, that a release, &c. with warranty, works a discontinuance, and puts the issue in tail to his action. (*d*)

In case of a release with warranty, it is not requisite that the releasor should ever have been actually in possession by force of the entail, as in other cases of discontinuance (*e*); and if there be tenant for life, the remainder over in tail, and the tenant for life dies, and a stranger intrudes, during whose possession he in remainder releases with warranty in fee, and has issue, and dies, the issue cannot enter, for, by the opinion of all the justices, this release with warranty is a discontinuance, and countervails an entry and feoffment. (*f*)

But the warranty must descend upon the person claiming the land (*g*), for the warranty itself is not any discontinuance, unless the warranty and right descend together to the same issue (*h*), as if one having a son, marries a second wife, and land is given to

(*a*) Gilb. Ten. 124.
(*b*) Hawk. Co. Litt. 425, 7th edit. Brown's Case, 3 Rep. 51, a.
(*c*) Gilb. Ten. 120.
(*d*) Co. Litt. 328, b.
(*e*) Co. Litt. 339, a.
(*f*) Br. Ab. Discont. de pos. 21.
(*g*) Gilb. Ten. 120.
(*h*) Saul v. Clerk, Latch, 65.

Of *formedon.*

Discontinuance.

the husband in special tail, and he has issue by his second wife, and is disseised, and releases with warranty, and dies, yet the entail is not discontinued, because the warranty descends to the heir at common law. (*a*)

Discontinuance taken away by statute in certain cases.

There are some cases in which the effect of a discontinuance has been taken away by statute. By statute 11 H. 7, c. 20, if any woman who has an estate in tail jointly with her husband, or only to herself, or to her use, of any manors, lands, &c. of the inheritance or purchase of her husband, or given to the husband and wife in tail by any of the ancestors of the husband, or by any other person seised to the use of the husband or his ancestors, shall, being sole, or with any after taken husband, discontinue, such discontinuance shall be utterly void, and every person to whom the interest, &c. after the decease of the woman, of the manors, lands, &c. discontinued, should appertain, may enter as if no such discontinuance had been made. And, if such (after taken) husband and wife make such discontinuance, the person to whom the manors, lands, &c. should belong, after the death of the woman, may enjoy, and enter according to such title and interest as he should have had in the same, if the woman had been dead, and no discontinuance had, as against the husband during his life, if the discontinuance be had by the woman and husband during the coverture. Provided that the woman after the death of the husband may re-enter, &c., and enjoy the lands, &c. according to her first estate; but, if the woman, at the time of such discontinuance, be sole, she shall be barred of her title and interest from thenceforth, and the person to whom the title, &c. should belong after the death of the woman, may immediately enter. Provided also, that the act shall not extend to any recovery or discontinuance to be had where the heirs next inheritable to the woman, or where he who has the next estate of inheritance after the death of the woman, be assenting to the recovery, where the assent is of record or enrolled. (*b*)

And by the statute 32 H. 8, c. 28, (*c*) it is enacted, that no fine, feoffment, or other act made, suffered, or done by the husband only, of any manors, lands, tenements, or hereditaments, being the

(*a*) Litt. s. 602, 603. Hawk. Co. Litt. 426.

(*b*) For the decisions on this statute, see 2 Danvers Ab. 579. Bacon's Ab. Discont. D. Com. Dig. Discontin. (A. 5,) &c.

(*c*) "This statute," says Mr. Preston, (Shep. Touch. 28, b.) "does not prevent the discontinuing or divesting. It merely gives the remedy by entry instead of the remedy by action."

inheritance or freehold of his wife during the coverture between them, shall in anywise be or make any discontinuance thereof, or be prejudicial or hurtful to the said wife or her heirs, or to such as shall have right, title, or interest to the same, by the death of such wife or wives; but, that the same wife and her heirs, and such other to whom such right shall appertain after her decease, shall and may then lawfully enter into all such manors, &c. according to their rights, &c. any such fine, feoffment, or other act to the contrary notwithstanding, fines levied by the husband and wife (whereunto the said wife is party and privy) only excepted. (*a*)

Of *formedon*.

In general.

The writ of *formedon* is of three kinds, *formedon* in the descender, in the remainder, and in the reverter. It is in the nature of a writ of right (*b*), and is the highest action which tenant in tail can have, for he cannot have a writ of right proper, which is confined to such as claim in fee-simple.

Of the writ of *formedon* in general.

The writ of *formedon* lies generally for the recovery of any lands or tenements (*c*), or for a profit *a prender* in lands or tenements, or issuing out of lands or tenements, as if a rent of 20*l.* be granted in tail or in frankmarriage, issuing out of lands or tenements, and the donee aliens the same, his heir may have a writ of *formedon* in the descender for the recovery of it. (*d*) And so if the moiety of the profits of a mill be granted in tail. (*e*) So a writ of *formedon* will lie of an office, as of the serjeanty of the cathedral church of Lincoln. (*f*) But *formedon* will not lie for common, which was formerly recoverable by a *quod permittat*, in the nature of a *formedon* (*g*), a form of action, now superseded by the action on the case. A *formedon* lies of a copyhold, by protestation, in the nature of a writ of *formedon* at common law, for, though *formedon* in the descender is only given by statute, it shall yet be intended to have been a custom in the manor time out of mind. (*h*) The demandant must

(*a*) On this statute, see Co. Litt. 326, a. Baker v. Willis, Cro. Car. 477. Grenely's Case, 8 Rep. 72. Hawtrey's Case, Dyer, 191, b. Beaumont's Case, 9 Rep. 140, a. King v. Edwards, Cro. Car. 320.

(*b*) Finch's Law, 267. 3 Bl. Com. 192. Br. Ab. Formedon, 48, 77. Droit de Recto, 33, but see Formedon, 31.

(*c*) F. N. B. 212.

(*d*) F. N. B. 212 A., but this is only a discontinuance at election, see ante, p. 48.

(*e*) F. N. B. 212 B.

(*f*) 18 Ed. 3, 27, a. Co. Litt. 20, a. Jehu Webb's Case, 8 Rep. 47, a.

(*g*) F. N. B. 212 B. Br. Ab. Com. 45.

(*h*) Br. Ab. Ten. per copy, 24. Copyhold Cases, 4 Rep. 22, a.

Of *formedon*.

count of a gift made by the copyholder, and not by the lord. (*a*)

As a freehold is to be recovered in this writ, it must be brought against the tenant of the freehold. (*b*)

The demandant must allege the esplees in the count, and not in the writ. (*c*)

In the descender.

The writ of *formedon* in the descender, though it is generally said to be founded on the statute *de donis* (*d*), appears to have been maintainable in some special cases at common law. (*e*) As if a man had issue a son, and his wife died, and afterwards he took another wife, and land was given to him and his second wife, and to the heirs of their two bodies begotten, and they had another son, and the wife died, and afterwards the father died, and a stranger abated, the son could not have an assise of *mort-d'ancestor*, for one point of the writ is to inquire, whether the demandant be next heir to his father, which he could not be, for the eldest son is the next heir, for which reason a writ of *mort-d'ancestor* would have been inapplicable, and, therefore, even before the statute, he might have had a writ of *formedon* in the descender, which was, in fact, a writ founded upon that special case. (*f*)

A writ of *formedon* in the descender is given by the express words of the statute of West. 2, 13 Ed. 1, c. 1. (*g*) Since that statute, therefore, it lies where lands are given to a man, and the heirs of his body begotten, or to a man and a woman, and to the heirs of their body begotten, or to a man and a woman (the donor's cousin) in frankmarriage, by force of which gift the donees are seised, and afterwards the tenant in tail aliens the lands, or is disseised of them, and dies; and so upon every gift in tail of lands or tenements, if the ancestor aliens, or is disseised or deforced of the same, and dies, he who is heir to the lands by force of the gift, may have a writ of *formedon* in the descender. (*h*) Though the issue in tail may have a *formedon* on a disseisin done to their ancestor, yet, as it is never necessary to resort to that writ unless the estate tail is discontinued, the issue may, in case of such disseisin, enter or bring ejectment. A *formedon*

(*a*) Paulter v. Cornhill, Cro. Eliz. 361. 2 Watk. Cop. 36.

(*b*) F. N. B. 212 L. It might formerly have been brought against the pernor of the profits by 1 H. 7, c. 1.

(*c*) F. N. B. 220 C.

(*d*) 2 Inst. 336.

(*e*) Litt. s. 76. Heydon's Case, 3 Rep. 9, a. Co. Litt. 60, b. Butler's Note to Co. Litt. 326, b (1).

(*f*) Willion v. Berkley, 1 Plow. Com. 239.

(*g*) 2 Inst. 333.

(*h*) F. N. B. 212, I.

Of *formedon*.

In the descender.

in the descender lies also for the youngest son who inherits by custom, in which case the writ may be in the general form, but the count must be special (*a*), setting forth his title by the custom. Coparceners should join in a *formedon*, and if tenant in tail has issue two daughters, and one of them has issue a son, and dies, and the tenant in tail dies, and a stranger abates, in this case the surviving daughter and her nephew should join in a *formedon*. (*b*)

There are, indeed, two writs of *formedon* in the descender appropriated to coparceners; the first called a *writ of formedon in the descender, of land which he holds in coparcenary*, and the second, the *writ of formedon qui insimul tenuit*. The first writ lies in certain cases for the issue of one of the coparceners after partition made (*c*); the second, for the issue of one of the coparceners before partition upon a discontinuance by such coparcener. (*d*)

Seisin.

To maintain a real writ ancestral, there must be an actual seisin in the ancestor, from whom the demandant claims. (*e*) And, therefore, in a *formedon* in the descender, the ancestor, from whom the demandant claims, must have been seised by force of the entail; but, where lands are given to two men, and the heirs of the body of one of them, and he who has the inheritance marries and dies, leaving issue, such issue may, after the death of him who has the freehold, bring a *formedon* in the descender against a stranger who abates, and may allege the esplees in his father, for, to that intent the estate tail was vested in the donee (*f*); though the estate is not so executed in possession as to entitle the wife of the person taking the inheritance to dower. (*g*)

As this is an ancestral action, if the tenant in tail be himself disseised, he may have an assise or an action of trespass or ejectment, but not a *formedon*. (*h*)

How title is stated.

Writs of *formedon* are said to be founded upon title, in opposition to those writs which are founded upon a tort or deforcement. (*i*) It is necessary, therefore, in *formedon*, to set out a title in the writ as well as in the court, and the omission of *cosi-*

(*a*) Fitz. Ab. Garaunt. 94. F. N. B. 217 A.
(*b*) F. N. B. 213 C.
(*c*) F. N. B. 214 B. C. D.
(*d*) F. N. B. 216 A, &c.
(*e*) Bevil's Case, 4 Rep. 9, a. 10, a. Watk. Disc. 40. ante, p. 6.
(*f*) Perkins, s. 334, a. Dyer, 9, a. Co. Litt. 182, b. Stephens v. Brittridge, T. Raym. 36.
(*g*) Fearne, Cont. Rem. 36.
(*h*) F. N. B. 212 B.
(*i*) Buckmere's Case, 8 Rep. 86, b.

Of *formedon.*

In the descender.

nage, as it is called, in the writ, is matter of plea in abatement. (*a*) In *formedon* in the descender, the demandant must state himself to be heir both to the original donee, and to him who was last seised under the entail (*b*), and must consequently deduce his title, by making mention of all his ancestors who have been seised by force of the entail, and by naming each of them son and heir to his predecessor. (*c*) However, if any of the heirs in tail have not been seised by force of the entail, but having survived their father, have died before they entered into, or had actual seisin of the land, they need not be named *heirs* in the writ, although it may be requisite to mention them as *sons*, in order that the demandant may convey his descent correctly. (*d*) Thus, where lands have been given to D. and the heirs of his body, who is disseised, and dies, leaving a son E., who dies, never having been seised under the entail, leaving a son F., who also dies, never having been seised under the entail, leaving a son B., the demandant, the writ may run thus: "and which, after the death of the said D. and of E., the son of the said D. and of F., the son of the said E., ought to descend to B., the son of the said F., and cousin and heir of the said D." (*e*) The safest mode of stating the title in *formedon* in the descender, is to name every person mentioned in the writ, *son and heir*, even though he may not have been seised of the lands by force of the entail, for, although he be named heir, yet it is not material whether he was ever actually seised or not. (*f*) By this means, the demandant, if he has made himself heir to the person last seised, will also be sure that he has made himself heir to the donee. (*g*) Where a person has not been actually seised under the entail, and it is not necessary to mention him in order to deduce the title, his name, it is said, may be altogether omitted, as where tenant in tail is disseised, and dies, leaving two sons, and the eldest dies, never having been actually seised under the entail, the younger son may, it is said, omit all mention of his elder brother in his *formedon* (*h*), though it is safer, as it has been shewn, to name the elder brother son and heir to the

(*a*) Br. Ab. Omission, 5, and see post, in "Pleas in Abatement."

(*b*) Br. Ab. Formedon, 62. Buckmere's Case, 8 Rep. 88, b. Hale's Note, F N. B. 212 I (*a*).

(*c*) Ibid.

(*d*) Ibid. Booth, 144. Hob. 333.

(*e*) F. N. B. 212 G.

(*f*) F. N. B. 212 H.

(*g*) Buckmere's Case, 8 Rep. 88, b. Hale's Notes, F. N. B. 212 I (*a*).

(*h*) Br. Ab. Omission, 10. Formed. 56, 59. Dinghurst v. Bath, 3 Lev. 218. Hale's Note, F. N. B. 212 L (*a*). Hob. 333.

Of *formedon*.

In the descender.

father. (*a*) If the demandant be alleged to be brother and heir to L., who was son and heir to the donee, this is sufficient, without stating that L. died without issue (*b*), for, had he left issue, the demandant could not be his heir. In stating a descent to a married woman in *formedon* in the descender, it must be alleged to be a descent to her alone, and not to her and her husband, who is a stranger to the blood of the donee, but in *formedon* in the reverter, it may be alleged to return either to the wife alone, or to the husband and wife. (*c*) The demandant in *formedon* in the descender is compelled to name all his ancestors, because he is supposed to be privy to, and to know his own pedigree and descent. (*d*)

In the remainder.

At common law, a *formedon* in the remainder upon an estate tail did not lie, for such an estate before the statute *de donis* was a fee-simple conditional, upon which no remainder could be limited, but, when the statute had given a remainder upon an estate tail, it was held, that the remainderman was within the equity of the statute, as being within the mischief provided against, though no writ of *formedon* in the remainder is given by the statute. (*e*)

A *formedon* in the remainder lies where lands are given to one in tail, remainder to another in tail, and the first tenant in tail discontinues, and dies without issue, or not having made any discontinuance, dies without issue, and a stranger abates, and deforces the remainderman (*f*), though in the latter case ejectment is now the proper remedy. So it lies where lands are given for life, the remainder to another and the heirs of his body begotten, and the tenant for life dies, and a stranger abates and deforces him in remainder (*g*), though in this case also, an ejectment may be maintained; so it lies where lands are given in tail the remainder in fee to another, and the tenant in tail discontinues, and dies without issue. (*h*)

(*a*) Though this seisin in law in the elder brother is not sufficient to make him the *terminus*, or person last seised within the rule of *seisina facit stipitem*, which requires an actual seisin, (Watk. Disc. 42,) yet a fine levied by him will be a bar to his younger brother, 1 Prest. Shep. Touch. 26, and see Mackwilliam's Case, Hob. 333.

(*b*) Burrow v. Haggitt, 1 Mod. 219.

(*c*) Clanrickard v. Sidney, Hob. 1. Br. Ab. Formed. 68.

(*d*) Buckmere's Case, 8 Rep. 88, b.

(*e*) 2 Inst. 336. F. N. B. 218 A. 3 Bl. Com. 192. *Formedon* in the remainder is said to have lain at common law on a lease for life remainder over in fee. Br. Ab. Formed. 69.

(*f*) F. N. B. 217 D.

(*g*) F. N. B. 217 E.

(*h*) F. N. B. 217 E.

Of *formedon.*

In the remainder.

It seems also, that if a man leases lands for life, the remainder to another in fee, and the tenant for life aliens in fee, in tail, or for life, and dies, and a stranger abates, and deforces the remainderman, he or his heirs may have a *formedon* in the remainder (*a*), though he may also maintain ejectment.

If lands are granted for life, and the reversion is afterwards granted to another in tail, and the tenant for life dies seised, and a stranger abates, the grantee in tail of the reversion may have a writ in the nature of a writ of *formedon* in the remainder, but, if the reversion is granted in fee, a *formedon* in the reverter lies. (*b*)

When a remainder is once executed, and the remainderman or his heirs seised of the lands by force of the remainder, he or they can no longer have a *formedon* in the remainder (*c*), but a possessory or other remedy according to the nature of the case.

How title is stated.

In *formedon* in the remainder, the demandant in conveying his title must shew that the original estate tail, or other estate upon which the remainder is limited, has expired, and if any mesne remainders have been limited between that estate and his own, that they also have determined, and the omission of this is matter of plea in abatement. (*d*) Thus where in *formedon* in the remainder the demandant entitled himself by shewing that *the issue* in tail was dead without issue, but did not say that the donee in tail was dead without issue, Holt, C. J. held that the latter fact ought to have been shewn, for that is the very point of the action: that it must appear that the first donee is dead without issue, which cannot be implied from the averment that the issue is dead without issue. (*e*) But although the donee had issue inheritable to the prior estate tail, and who were actually seised of the same, yet the demandant need not name such issue in the clause, "and which after the death," &c. but may say "and which after the death of the donee ought to remain to him, because the donee died without issue." The reason of this general averment being allowed, is because the demandant is a stranger to the pedigree of the donee. (*f*) Where land is limited

(*a*) Ibid. As to *formedon* in the remainder at common law, upon common recovery suffered by tenant for life, see Co. Litt. 280, b. Sir W. Pelham's Case, 2 Leon. 62, 64.

(*b*) F. N. B. 218 D. 219 E. Earl of Clanrickard's Case, Hob. 282.

(*c*) F. N. B. 219 A.

(*d*) Br. Ab. Formed. 39. Buckmere's Case, 8 Rep. 88, a. Vin. Ab. Formed. (I.)

(*e*) Herbert v. Morgan, 5 Mod. 17.

(*f*) Buckmere's Case, 8 Rep. 88, a.

in tail to P. and K., the remainder to F. in fee, and the writ runs, "which after the death of P. and K. to T. son and heir of F. ought to remain," it is good without expressly alleging the death of F. because the alleging T. to be the heir of F. imports as much. (*a*)

Of *formedon*.

In the remainder.

It has been doubted whether, in *formedon* in the remainder, it is not necessary to name the issue of the preceding remaindermen who may have been entitled; but the same reasoning upon which it has been held unnecessary to name the issue of the donee, appears to apply to the issue of the preceding remaindermen. (*b*) In this case, therefore, it seems sufficient to say, "because the said A. (the mesne remainderman) died without issue."

If the remainder in tail is once executed, and the issue in tail is afterwards compelled to bring a *formedon* in the descender, he need not mention the prior estates, but may count as on an immediate gift to his ancestor. (*c*) But if a lease for life is made, remainder in tail to A., remainder in tail to B.; if A. dies without issue in the lifetime of the tenant for life, and B. is driven to his *formedon* in the remainder, he must still mention the remainder to A. although it be determined and spent. (*d*)

In the reverter.

The writ of *formedon* in the reverter lay at common law, if the tenant in fee simple conditional aliened before he had performed the condition of the gift by having issue, and afterwards died without issue. (*e*) Since the statute *de donis*, the writ lies where lands are given in tail or in frankmarriage, and the donee or his issue dies without issue of his body, in which case the donor or the grantee in fee of the reversion may have a writ of *formedon* in the reverter. (*f*) But a writ of *formedon* is only necessary where the estate tail has been discontinued and the reversion turned to a right.

In *formedon* in the reverter, the demandant cannot in one writ demand lands which come to him by several titles, as for instance, if B. by one deed gives the manor of D. to A. and the heirs of his body, and afterwards by another deed, gives fifty acres of land to A. and the heirs of his body, and A. dies

(*a*) Freak v. Binford, Hob. 51. F. N. B. 218 B, note (a).

(*b*) Booth, 52, 54. Dyer, 216.

(*c*) Wimbish v. Tailboys, 1 Pl. Com. 52. Br. Ab. Formed. 23, 62. Hale's Note, F. N. B. 218 E (b). 219 D.

(*d*) Buckmere's Case, 8 Rep. 88, a.

(*e*) 2 Inst. 336. Finch's Law, 268. Bole v. Horton, Vaugh. 367. 3 Bl. Com. 192.

(*f*) F. N. B. 219 E.

Of *formedon.* In the reverter.

without issue, the donor, upon these two distinct gifts, cannot have one writ of *formedon.* (*a*) But where lands are given to a brother and sister, and the heirs of their bodies issuing, which gives them a joint estate for life, and several remainders in tail, yet one *formedon* in the reverter will be sufficient. (*b*)

How title is stated.

The demandant in *formedon* in the reverter, must trace his descent from the donor with the same precision which is required from the demandant in *formedon* in the descender, when he conveys his title from the donee. All the ancestors, therefore, to whom the reversion descended, must be named in the writ, and the omission of any of them is ground of plea in abatement. (*c*) If the donor die, leaving two sons, and the eldest son die before entry, in a *formedon* in the reverter brought by the younger son, he ought, it is said, to mention his brother who survived his father, because he held the estate although he was not seised of the land. (*d*) But if the eldest son did not survive the father, he may be omitted. (*e*)

The demandant in *formedon* in the reverter need not, and indeed ought not, to trace the descent of the estate tail from the *donee;* but should say generally "because A. (the donee) died without issue," &c. and this is sufficient though the donee has had issue who have been seised. (*f*)

Process, &c. in *formedon.*

The process is summons and grand cape before appearance, and petit cape after appearance. The demandant and tenant may both be essoined; aid, view, voucher, and receit lie. The tenant may plead in abatement or in bar. No damages or costs are recoverable. By the statute of limitations, 21 Jac. 1, c. 16, s. 2, a writ of *formedon* must be brought within twenty years. (*g*)

(*a*) Buckmere's Case, 8 Rep. 87, a.
(*b*) Ibid. Dyer, 145, b. Cotton's Case, 1 Leon. 213.
(*c*) Buckmere's Case, 8 Rep. 88, a. Br. Ab. Formedon, 11. Vin. Ab. Formedon, (K).
(*d*) F. N. B. 220 D. Booth, 155.
(*e*) Br. Ab. Omission, 10.
(*f*) Buckmere's Case, 8 Rep. 88, a. Dyer, 14, b. 216, a. Br. Ab. Formed. 37. Booth, 155.
(*g*) See further, under the proper heads.

Of Writs of Assise.

Of assise of novel disseisin.

Of disseisin.

DISSEISIN, properly so called, is a wrongful ouster of him who is in possession of the freehold. (*a*) It differs from discontinuance, inasmuch as a discontinuer is always seised of a rightful estate at the time of the discontinuance made, which is not essential to a disseisin, and inasmuch as a discontinuance reduces the party injured to his action, while a disseisin only puts him to his entry. It differs from an abatement in the circumstance of the injury being committed to a seisin *in deed*, while an abator only deprives the heir-at-law of the seisin *in law*, which was cast upon him on the death of his ancestor. It differs in the same manner from an intrusion. (*b*) It is difficult to determine under what head to class the injury which is committed by a tenant for life, when by fine or feoffment in fee, he displaces the remainder or reversion. It has sometimes been called a discontinuance (*c*); but as the entry of the reversioner is not taken away, this appellation appears to be improper. It is not regularly a disseisin, for the wrong doer himself is in possession of the freehold; nor is there any ground for calling it an abatement, or an intrusion. The injury, however, may be classed under the general name of a deforcement. (*d*)

By whom.

A disseisin may be committed by a mere stranger, or by one who is entrusted with the possession, as a tenant for years or tenant at will. (*e*) If the act be committed by tenant for life, it cannot, as it has been said, be properly called a disseisin; and when committed by tenant in tail, or one who is seised *in auter droit*, it is a discontinuance and not a disseisin.

By what means.

As a disseisin is a wrongful ouster of the freehold, it can only be accomplished by means adequate to transfer the freehold. Thus, if the act be committed by a stranger, an assumption of property in the freehold is necessary. If he enters upon the

(*a*) Litt. s. 279.

(*b*) Co. Litt. 277, a.

(*c*) Litt. s. 470. Co. Litt. 325, a.

(*d*) Co. Litt. 277, b. and see Mr. Preston's argument in Goodright v. Forrester, 1 Taunt. 589, and Williams d. Hughes v. Thomas, 12 East, 141.

(*e*) Br. Ab. Disseisin, 3, 64, 66. T. Jones, 317. Co. Litt. 330, b. note (1).

Of assise of novel disseisin.

Disseisin.

lands merely, this is no disseisin, he must enter and oust the true owner, which ouster may be by expressly claiming the freehold, or by taking the profits. (*a*) According to Lord Holt, a bare entry only, without *an expulsion*, makes such a seisin only that the law will adjudge *him* in possession who has the right, but it will not work a disseisin or abatement, without actual expulsion. (*b*) Whatever may have been the doctrine formerly, it seems to be now established law, that in order to constitute a disseisin, the act must be such that an intention to disseise may be inferred from it. (*c*) Nor does this rule militate in any degree against the old and correct distinction between actual disseisin, and disseisin at election. It is said in some modern cases, that in order to constitute a disseisin there must be a wrongful entry (*d*); but this doctrine must not be understood to affect the operation of a feoffment made by tenant for years during the continuance of the term, which creates a disseisin and renders a fine levied by the feoffee valid by non-claim.

Disseisin at election.

The doctrine of disseisin at election has been much discussed in modern times, and according to the view of the subject taken by Lord Mansfield, it is difficult to imagine a case in which an *actual* disseisin can at the present day be committed. (*e*) This opinion has been most ably controverted by Mr. Butler (*f*), and the question may, perhaps, be considered as still open to discussion. It seems that the doctrine of disseisin at election is to be confined to those cases in which, either on account of the nature of the property to which the injury is done, or of the act which is committed, no actual disseisin can take place; but, that in every case where the property is susceptible of such an injury, and the act has all the qualities necessary to constitute a disseisin, it is not in the power of the injured party to elect, whether or not he will consider himself disseised.

Thus there can be no disseisin of incorporeal hereditaments, because no entry can be made upon them, and therefore the real owner cannot be put to his entry, but for the sake of the remedy

(*a*) Co. Litt. 181, a.

(*b*) Anon. 1 Salk. 246, and see Litt. s. 701.

(*c*) Blunden v. Baugh, Cro. Car. 304. Jerrett v. Weare, 3 Price, 575. Williams d. Hughes v. Thomas, 12 East, 141. Doe v. Perkins, 3 M. and S. 271, but *quære* the application of the law in the two last cases.

(*d*) Per Bayley, J. Hall d. Surtees v. Doe, 5 B. and A. 689. Doe v. Perkins, 3 M. and S. 271.

(*e*) Doe d. Atkyns v. Horde, 1 Burr. 60.

(*f*) Co. Litt. 330, b. note (1).

he may elect to consider himself disseised. So where a person comes rightfully into the possession of lands, as a termor for instance, and without doing any act to render himself a disseisor, refuses when his title is determined to restore the lands to their owner, the latter may elect to consider him a disseisor, and may bring an assise of novel disseisin against him. But where such a person commits an act amounting to a disseisin, as by making a feoffment, this, as it seems, is an actual disseisin, and the lessor will not be allowed to elect, whether he will consider himself disseised. For if it were not a disseisin until such election, then until that time a wrongful estate in fee would not be acquired, and if a fine were levied such fine would be merely void, and *partes finis nihil habuerunt*, might be pleaded to it. In fact, however, such fines after a feoffment have been repeatedly held good, and the lessor will be barred by non-claim, unless he enter within five years after the levying of the fine, or after the expiration of the term. (*a*)

Of assise of novel disseisin.

Disseisin.

The effect of a disseisin is to devest the estate out of the disseisee, and vest it in the disseisor, leaving nothing in the former but the mere right and a right of entry. The remedy of the disseisee is therefore by ejectment, or other possessory action within twenty years, or by a writ of entry or of right afterwards, according to the circumstances of the case.

With regard to strangers, the disseisor immediately becomes the proper tenant to the *præcipe* in any actions brought by them. (*b*)

An assise of novel disseisin, which is a possessory remedy, lies where a man has been disseised, or chuses to admit himself disseised of lands, tenements, or hereditaments. It is so called because the justices in eyre used to go their circuit every seven years, and no assise was allowed to be taken before them upon a disseisin committed previously to their last circuit, such disseisin being called an ancient disseisin, in opposition to the novel or recent disseisins. (*c*) This action was a highly beneficial, and formerly a very frequent remedy. From the celerity of the proceedings adopted in it, it was said to be *maxime festinum*, and it

Where an assise of novel disseisin lies.

(*a*) Whaley v. Tankard, 2 Lev. 52. 1 Vent. 241, S. C. Mr. Butler's note, Co. Litt. 330, b (1).

(*b*) Brediman's Case, 6 Rep. 58, b.

(*c*) Co. Litt. 153, b.

Of assise of novel disseisin.

was the only writ by which, at common law, the demandant recovered not only the land itself, but likewise damages from the time of the disseisin done. (*a*) Assise can only be maintained during the life of the disseisor, who must be named in the writ, which may otherwise be abated. (*b*) In modern practice, the assise of novel disseisin, has been entirely superseded by the action of ejectment. It continued for some time in use as a remedy in cases of ousters of freehold offices (*c*); but at present *assumpsit* for money had and received, is the usual form of action to try the right to an office. (*d*)

By whom brought.

The following persons may have an assise of novel disseisin. Tenant in fee-simple, fee-tail, or for life. (*e*) Tenant by *elegit*, by the express words of the statute of Westminster 2, c. 18, and by the equity of the statute, his executors or administrators. (*f*) So tenants by statute merchant and statute staple, by particular enactment. (*g*) And if tenant by *elegit*, &c. be disseised, the tenant of the freehold may likewise have an assise (*h*), and upon the recovery of one, the writ of the other shall be abated. (*i*) If a tenant for years or at will be ousted, or if the latter grant the possession to another who enters, the lessor may have an assise. (*k*) In these cases it will be observed, that the plaintiff has an actual seisin, sufficient even to make a *possessio fratris* (*l*), but where the plaintiff has only a seisin in law, he cannot maintain assise. (*m*) Thus the heir on the death of his ancestor cannot maintain an assise against an abator, before actual entry (*n*); though if the ancestor had leased for years and died, and the lessee had been disseised, the heir might then have had assise. (*o*) An assise will, however, lie upon *an entry* in law, as where the plaintiff for fear of bodily harm dares not enter upon the land, but makes claim as near to it as he dares; such claim will, however, only vest the seisin in him for his own

(*a*) Bract. 186, b. 2 Inst. 284, see post, in "Damages."
(*b*) See post.
(*c*) See Lilly's Reports in Assise.
(*d*) Boyter v. Dodsworth, 6 T. R. 683.
(*e*) F. N. B. 177. A. Com. Dig. Assise. (B. 4.) Booth, 263.
(*f*) 2 Inst. 396.
(*g*) F. N. B. 178 G.
(*h*) 1 Rol. Ab. 271, l. 6.
(*i*) Hale's Note, F. N. B. 178 G.
(*k*) 1 Rol. Ab. 271, l. 4, 8, 12. Crumwell v. Andrews, Dyer, 355, a. Keilw. 109, b.
(*l*) Watk. on Desc. 49, before admittance, an heir copyholder cannot have a plaint in nature of an assise. Co. Copyh. s. 4.
(*m*) Litt. s. 681. Gilb. on Rents, 108.
(*n*) 1 Rol. Ab. 271, l. 10. Keilw. 109, b.
(*o*) Keilw. 110, a. 1 Rol. Ab. 270, l. 46.

advantage, for if, pending the assise, he makes claim, it will not abate the writ, which would be the consequence of an entry in deed. (*a*) A tenant for years, or other person who has not a freehold interest (except tenant by *elegit*, &c.) cannot maintain an assise of novel disseisin. (*b*) Of assise of novel disseisin.

An assise must be brought against the tenant of the freehold, though it is sufficient if he be seised of the freehold in law. (*c*) If the disseisor be not tenant, the writ ought to be brought against the tenant and the disseisor also, for unless the disseisor be named in the writ it will abate. (*d*) If the tenant was not known it might formerly have been brought against the pernor of the profits within a year after his title commenced, but it might have been brought against the disseisor at any time during his life, if he was pernor at the time of the writ purchased. (*e*) Against whom.

When an assise of novel disseisin is brought for a rent service, it is sufficient to make the tenant or pernor of the rent and the disseisor defendants. (*f*) But where a rent is against common right, as a rent-charge, or rent-seck, it is necessary to name all the tenants of the land out of which the rent issues. (*g*) So also in assise of common. (*h*)

An assise for tithes by stat. 32 Hen. 8, c. 7, s. 7, may be brought against the pernor without naming the terre tenant. (*i*)

At common law there were only two forms of the writ of assise of novel disseisin, the assise *de libero tenemento*, and the assise *de communiâ pasturæ*. The former writ was applicable to a disseisin of houses, land, rent, and other things which lay in *render*, and which might be demanded in a *præcipe quod reddat;* the latter writ was allowed, although for the recovery of incorporeal property, in consequence of the grievance to the freehold, which would have ensued, if the tenant had been deprived of his common of pasture for supporting his beasts; but for profits *a prender*, which are said by Sir Edward Coke to consist *in colligendo, habendo, recipiendo, et exercendo,* no assise of novel For what.

(*a*) Co. Litt. 253, b.

(*b*) Br. Ab. Darr. presentm. 2 Com. Dig. Assise, (B. 5).

(*c*) Com. Dig. Ass. (B. 6.) Booth, 263. Litt. s. 681.

(*d*) O. N. B. 160, a. Br. Ab. Assise, 375. Booth, 263.

(*e*) Stat. 1 R. 2, c. 9. 4 Hen. 4, c. 7. Com. Dig. Assise, (B. 6). See ante, p. 8.

(*f*) F. N. B. 178 D. Br. Ab. Assise, 330. Jointenants, 62. Booth, 263.

(*g*) Dyer, 31, b. 84, a. Br. Ab. Assise, 330. F. N. B. 178 D. Gilb. on Rents, 58, 133. Brediman's Case, 6 Rep. 58, b.

(*h*) Tyringham's Case, 4 Rep. 37, b.

(*i*) Dean and Ch. of Bristol v. Clerke, Dyer, 84, a. Com. Dig. Assise, (B. 6).

Of assise of novel disseisin.

disseisin lay at common law, but the party was driven to his *quod permittat*, which was a tedious remedy and could not be had by one who was only tenant for life. (*a*)

Estovers, &c.

In order to remedy this inconvenience, it was enacted by the statute of Westminster 2, 13 Edw. 1, c. 25, that an assise of novel disseisin shall lie for estovers of wood, profits to be taken in woods by gathering nuts, acorns, and other fruits, for a corody for delivery of corn and other victuals and necessaries to be received yearly in a place certain, toll, tronage, passage, pontage, pawnage, and such like, to be taken in places certain, keeping of parks, woods, forests, chases, warrens, gates, and other bailiwicks, and also for offices in fee. (*b*)

Offices.

With regard to offices, this statute is only made in affirmance of the common law. (*c*) At common law, a *præcipe quod reddat*, and consequently an assise, lay for an office, since whatever may be demanded in a *præcipe quod reddat*, may be recovered in an assise. (*d*) An assise, therefore, although the statute only mentions offices in fee, will lie for offices in tail, or for life, as for *officium messoris* for the life of the grantee. (*e*) So an assise will lie for the office of filacer of the Common Pleas, and the post where he sits shall be put in view (*f*); for the office of one of the clerks of the crown in Chancery (*g*), of a keeper of a park (*h*), of sergeant at mace to the House of Commons (*i*), and of marshal of the King's Bench. (*k*) So for the office of Chester herald, and the recognitors had a view of a funeral at Westminster, at which the herald ought to attend (*l*), for the office of sheriff, if granted for life, and of steward, bailiff, receiver, or beadle of a manor (*m*), and for offices in the Admiralty, spiritual, or other court, as well as in the courts of common law. (*n*) If a man be disseised of the whole office, he shall have an assise *de officio cum pertinentiis*,

(*a*) Jehu Webb's Case, 8 Rep. 46, a. Co. Litt. 159, a. 2 Inst. 411, 12, ante, p. 41.

(*b*) 2 Inst. 411. Jehu Webb's Case, 8 Rep. 46, b. Vin. Ab. Assise, (A. 2). F. N. B. 178 F.

(*c*) 2 Inst. 412. Assumpsit for money had and received is now the usual action for trying a right to an office. But this action only lies where there are certain fees annexed to the office, and not for a mere gratuity. Boyter v. Dedsworth, 6 T. R. 681.

(*d*) Jehu Webb's Case, 8 Rep. 49, a.

(*e*) Br. Ab. Ass. 508. Fitz. Ab. Ass. 296. Webb's Case, 8 Rep. 47, a.

(*f*) Vaux v. Jefferen, Dyer, 114, b.

(*g*) Br. Ab. Assise, 95.

(*h*) Earl of Shrewsbury v. Earl of Rutland, 2 Brownl. 229.

(*i*) Cragge v. Norfolk, 2 Lev. 120.

(*k*) Savier v. Lenthall, 1 Salk. 82. Lilly Ass. 93, S. C.

(*l*) Parson v. Knight, 2 Brownl. 268.

(*m*) Jehu Webb's Case, 8 Rep. 47, a. b.

(*n*) 2 Inst. 412.

but if he be disseised of a parcel only, he may have an assise for that parcel. (*a*) The plaintiff in assise for an office must have had an actual seisin, as in other cases. (*b*)

Of assise of novel disseisin.

It is said that the master of an hospital cannot maintain an assise for his office, because he is not sole seised. (*c*) An assise of novel disseisin will not lie of an office of charge merely, and no profit; but in assise for an ancient office, it is not necessary to state that there is any fee or profit belonging to it, which should it seems be shewn in assise for a new office. (*d*)

There is, it is said, one case, in which a man may have an assise of novel disseisin at common law, though he is himself seised of the freehold of the land at the time of action brought. This is when the lord so frequently distrains his tenant, that the latter cannot manure his lands, or in the words of Sir Edward Coke, is disseised of the quiet enjoying of his lands. (*e*) In ancient times, it appears, that a wrongful distress in some cases constituted an absolute disseisin of the land, if the tenant was wholly deprived of the use and enjoyment of the premises. (*f*) But, where the wrongful distress did not absolutely deprive the tenant of the use of the land, it appears to have been considered as a trespass only. (*g*) An assise of *sovent foits distresse*, as it is called, does not lie for homage or fealty, the distress for which, it is said, cannot be excessive. (*h*)

Frequent distress.

Before the statute of Westminster 2, an assise of common lay only for common of pasture, and not for any other species of common, nor was there any writ in the Register for common of piscary, turbary, &c. (*i*), but, by the statute of Westminster 2, an assise may be brought for common of piscary, turbary, and the like commons appendant to freehold, or without a freehold by special deed, for term of life at least. (*k*) Where a common has been inclosed above twenty years, a commoner's

Assise of common.

(*a*) Fitz. Ab. Plaint, 23. Jehu Webb's Case, 8 Rep. 49, b.

(*b*) Vin. Ab. Assise, (B).

(*c*) Phillips v. Bary, 1 L. Raym. 9. 2 T. R. 355, but see Bagg's Case, 11 Rep. 99, b. Coveney's Case, Dyer, 299, a.

(*d*) Jehu Webb's Case, 8 Rep. 49, b. Fitz. Ab. Assise, 296, per Shard. 2 Inst. 412.

(*e*) 2 Inst. 414. Jehu Webb's Case, 8 Rep. 50, a. Bevil's Case, 4 Rep. 11, b.

(*f*) Bracton, 162, a.

(*g*) Bract. 217, a. 1 Reeve's Hist. 338

(*h*) Br. Ab. Assise, 291.

(*i*) Jehu Webb's Case, 8 Rep. 48, a.

(*k*) 2 Inst. 412. 2 Reeve's Hist. 204.

Of assise of novel disseisin.

right of entry is gone (*a*), and he must resort to his assise of common. (*b*)

Tithes, &c.

By statute 32 Hen. 8, c. 7, s. 7, an assise of novel disseisin lies for a parsonage, vicarage, portion, pension, tithes, and other profits ecclesiastical or spiritual in temporal hands. (*c*)

An assise does not lie of a service omitted, as of suit to a mill, though it lies of toll to a mill, and of toll thorough, toll traverse, and toll turn. Nor does it lie for homage, nor for an annuity or pension, nor for a way over land, which is an easement, and for which a *quod permittat* lies. (*d*)

In what court.

The rule in the Register, with regard to the court in which assises of novel disseisin should be brought, is as follows; all assises of novel disseisin and *mortd'ancestor*, which happen within the county in which the Common Pleas sits, shall be returnable in that court; and, if the King's Bench sit in another county than the Common Pleas, then all the assises in the county in which the King's Bench sits shall be returnable therein (*e*), "but, if both the courts are sitting in the same county, the usage," says Fitzherbert, "is to bring the assise in the King's Bench or Common Pleas at pleasure," though he adds, that "this is against the rule in the Register." (*f*) The proper course, in such case, seems to be to bring it in the Common Pleas. (*g*)

In what county.

By Magna Charta, c. 12, assises are directed to be taken in their proper counties. (*h*) At common law, if a man has common in land in one county, appendant or appurtenant to land in another county, and he is disseised of his common, he may have an assise *in confinio comitatus*, that is, he may issue a writ to the sheriff of each county, upon which it appears, that only one assise is to be arraigned. (*i*) So of a nuisance done in one county to lands lying in another county, the like assise lay at common law; and the same mode of proceeding is given by statute, 7 R. 2, c. 10, in cases of a rent issuing out of lands in several counties, where, although the plaintiff has several writs of assise, he may make his plaint of the whole rent in either county. (*k*)

(*a*) Hawke v. Bacon, 2 Taunt. 159.
(*b*) Creach v. Wilmot, 2 Taunt. 160, note.
(*c*) Co. Litt. 159, a.
(*d*) John Webb's Case, 8 Rep. 46, b. 1 Rol. Ab. 270. Booth, 265.
(*e*) Reg. Br. 196, a. Vin. Ab. Assise, (S).
(*f*) F. N. B. 177 B.
(*g*) Br. Ab. Mortdaun. 60.
(*h*) 2 Inst. 24.
(*i*) F. N. B. 180 A. Bulwer's Case, 7 Rep. 3, b. Booth, 265.
(*k*) Co. Litt. 154, a.

Of assise of novel disseisin.

Form of the writ.

The original writ of assise of novel disseisin commences with a complaint of the disseisin done, and commands the sheriff, that he cause the land to be reseized, of the chattels that within it were taken, and the same with the chattels to be in peace, &c. until the arrival of the justices of assise, and, in the meantime, to summon a jury to view the premises, and to make recognition, &c. (*a*) It appears, that even in the time of Bracton, the command to reseize the lands and goods was matter of form, and, that if the disseisor wasted or carried them away, the disseisee was to recover their value in damages. (*b*)

At common law, as already stated, there were only two forms of the writ of assise of novel disseisin, the assise *de libero tenemento*, and the assise *de communiâ pasturæ*. And, when an assise is brought for a disseisin of a profit, &c., under the statute of Westm. 2, or for an office, or for tithes, or by tenant by *elegit*, &c., the form of the writ *de libero tenemento* is still preserved, and the allegation of the disseisin is general, that the defendant has disseised the plaintiff of his freehold, &c., but the plaint must state the facts truly. (*c*)

An assise of novel disseisin being founded upon a tort, and no title being made in the writ, the plaintiff may sue in one writ for lands which came to him by several titles. (*d*)

The proceedings in an assise of novel disseisin are very expeditious. The writ itself is an attachment, upon which the sheriff attaches the defendant to appear at the return, and, upon *nihil* returned, or upon the defendant being attached, and making default, the assise is taken by default. The defendant cannot be essoigned, but it seems that the plaintiff may. The defendant may vouch, if the vouchee is ready to enter immediately into the warranty. Receit lies, and a view is given to the recognitors, but not to the party. Aid does not lie, unless of the king, or of a party to the writ. Summons and severance lies. Damages and costs may be recovered, and judgment may be given either in bank, or at *nisi prius*. (*e*)

(*a*) Plowd. 228, a. Booth, 210.

(*b*) Bract. 179, b. 1 Reeve's Hist. 396.

(*c*) Dean and Ch. of Bristol v. Clarke, Dyer, 88, b. Webb's Case, 8 Rep. 48, a. Co. Litt. 159, a. Com. Dig. Assise, (B. 8).

(*d*) Buckmere's Case, 8 Rep. 88, b. Com. Dig. Action, (G). Vin. Ab. Assise, (T).

(*e*) See post, under the proper heads.

Of redisseisin.

In order to prevent frequent and vexatious disseisins, it is enacted by the statute of Merton, 20 Hen. 3, c. 3, that "if any have been disseised of their freehold, and before the justices in eyre, have recovered seisin by assise of novel disseisin, or by confession of them who did the disseisin, and the disseisee has had seisin delivered by the sheriff, if the same disseisors, after the circuit of the justices, or in the meantime, have disseised the same plaintiff of the same freehold, and thereof be convict, they shall be forthwith taken and committed, and kept in the king's prison, until the king has discharged them by fine, or by some other mean. And this is the form how such convict persons shall be punished. When the plaintiffs come into the court of our lord the king, they shall have the king's writ directed to the sheriff, in which must be contained the plaint of disseisin framed upon the disseisin. And then it shall be commanded to the sheriff, that he, taking with him the keepers of the pleas of the king's crown, and other lawful knights, in his proper person, shall go into the land or pasture whereof the plaint hath been made, and, that he make before them, by the first jurors, and other neighbours and lawful men, diligent inquisition thereof; and, if they find him disseised again, (as before is said) then let him do according to the provision before mentioned. But, if it be found otherwise, the plaintiff shall be amerced, and the other shall go quit. Neither shall the sheriff execute any such plaint without special commandment of the king. In the same manner shall be done to them that have recovered their seisin by assise of *mortd'ancestor*, and so shall it be of all lands and tenements recovered in the king's court by inquests, if they be disseised after by the first deforceors, against whom they have recovered anywise by inquest." (*a*)

Though the statute only speaks of justices in eyre, yet assises taken in the King's Bench, the Common Pleas, or before justices of assise, are within it. (*b*) The branch of the statute relating to redisseisins does not extend to an assise of *mortd'ancestor, darrein presentment*, or *juris utrum*; but upon a recovery in redisseisin, and a fresh disseisin afterwards, another writ of redisseisin lies. (*c*) When the first recovery has been upon a plaint in the nature of a *fresh force*, according to the custom of

(*a*) 2 Inst. 82. F. N. B. 188 B. Com. Dig. Assise, (F). Co. Litt. 154, a.

(*b*) 2 Inst. 13. F. N. B. 188 D.

(*c*) 2 Inst. 83. F. N. B. 189 D.

a city or a borough, a redisseisin does not lie, for it only lies where the first action was commenced by writ. (*a*) The statute only mentions recoveries by assise (that is by verdict) and by confession, but it is extended to a judgment by default, &c., by the statute of West. 2, c. 26. (*b*) The plaintiff must execute the former recovery either by being put into possession by the sheriff, or by entry. (*c*)

The sheriff is directed to take the coroners with him, and where there are two or more coroners, he ought to take two at least; but, if there be but one, it is sufficient within the meaning of the statute, if he take him (*d*), and the sheriff himself must go in his proper person. (*e*)

The clause, which provides that the sheriff shall make inquisition by the first jurors, only extends to cases where the recovery in the first assise was by verdict, and not where it was on demurrer, &c.; if, in the former case, all the jurors, or all but one, are dead, the writ of redisseisin is lost. (*f*)

The fresh disseisin must be done by the same disseisors, and, therefore, if the former recovery be against one, and he and another redisseise the plaintiff, the latter cannot have a writ of redisseisin, for the new disseisor does not come within the words of the statute, and the writ cannot be brought against the redisseisor alone, because he is jointenant with the other, and jointenancy in a writ of redisseisin is a good plea (*g*), but a writ of redisseisin lies against a redisseisor, and another to whom he has made a feoffment since the second disseisin. (*h*) Tenant by elegit, or statute merchant, may have a writ of redisseisin. (*i*) If a woman disseises and redisseises, and marries, this writ lies against her, and her husband must be joined for conformity, but he must not be charged as a principal actor in the wrong (*k*), and husband and wife may have a writ of redisseisin, though the original disseisin was not done to the husband. (*l*)

It seems, that whatever a man has recovered in an assise of

(*a*) 2 Inst. 83. Co. Litt. 154, a. F. N. B. 189 G.

(*b*) 2 Inst. 416. Co. Litt. 154, a.

(*c*) 2 Inst. 83. Co. Litt. 154, a.

(*d*) 2 Inst. 84. Evans v. Wilkins, Bridg. 119. Penson v. Knight, 2 Bulst. 93.

(*e*) Br. Ab. Parliam. 95.

(*f*) 2 Inst. 84. F. N. B. 189 H.

(*g*) Co. Litt. 154, a.

(*h*) Co. Litt. 154, b. F. N. B. 188. F. But see Br. Ab. Redisseisin 1.

(*i*) F. N. B. 189 I.

(*k*) Moore v. Hussey, Hob. 96.

(*l*) F. N. B. 88 E. Co. Litt. 154, b

Of redisseisin.

novel disseisin, if he is disseised again, he may again recover in this writ. Thus, it lies for common of pasture or other profit *a prender* in the soil of another, and of an office or corody (*a*); and, if a man recovers in an assise land to which common is appendant or appurtenant, and he is afterwards disseised of the common, a redisseisin lies for that, because it was tacitly recovered in the former assise (*b*), and redisseisin lies of part of the lands recovered (*c*), and upon an assise of nuisance. (*d*)

This writ is vicontiel, and not returnable, but the sheriff acts as judge, and gives judgment. (*e*) After the writ delivered, the sheriff may warn the defendant to attend the inquest; and, if he does not appear, or appears, and pleads nothing, the inquest shall be taken. (*f*) By the statute of Marlbridge, 52 H. 3, c. 8, the defendant shall not be delivered without the king's precept upon a fine paid; and, if the sheriff delivers him otherwise, he shall be amerced; the sheriff, therefore, gives judgment, that he be taken and detained until delivered by mandate of our lord the king, and the record is then removed by *certiorari* into the King's Bench, where the defendant is fined, and has a writ for his delivery (*g*), or he may have an habeas corpus. (*h*)

Of post disseisin.

A writ of post disseisin which lies where there is a recovery in *mortd'ancestor* or any other real action, (redisseisin lying only after a recovery in assise of novel disseisin and of nuisance,) is given after verdict by the statute of Merton, c. 3, and, after default, reddition, &c., by the statute of Westminster 2, c. 26. (*i*) If a man recovers lands or tenements in value against the vouchee in a *præcipe quod reddat* by default, and has execution, and the vouchee disseises him of the same lands, he may have a writ of post disseisin against the vouchee. (*k*) A writ of post disseisin must be brought by those who first recovered, or by some of them, of the land which was recovered, or part thereof, against those or some of them, against whom the recovery was had. (*l*)

(*a*) F. N. B. 188 L, B.
(*b*) Co. Litt. 154. F. N. B. 189 F.
(*c*) F. N. B. 188 G. Thatcher's Case, Goldsb. 76.
(*d*) F. N. B. 189 A.
(*e*) 2 Inst. 83.
(*f*) Com. Dig. Assise, (F. 2).
(*g*) 2 Inst. 115. F. N. B. 190 F.
(*h*) Somerfield v. Stanton, Noy, 11. Com. Dig. Assise, (F. 2).
(*i*) 2 Inst. 84, 416. F. N. B. 190 A.
(*k*) F. N. B. 190 C.
(*l*) F. N. B. 191 A.

Of post disseisin.

It is said, that if a man loses lands by default or reddition in a *præcipe quod reddat*, and afterwards disseises the recoveror, and makes a *feoffment* in fee, or for life, to another, the recoveror may have a post disseisin against him who disseised him again, although he be not tenant of the land; for, in a writ of post disseisin, the demandant has not judgment to recover the land, but the sheriff restores him to the possession, if he finds the disseisin, &c. (*a*)

This writ is vicontiel, and not returnable, but the sheriff holds the plea, and gives the judgment (*b*), and the proceedings are the same as in a writ of redisseisin. (*c*)

When a man was imprisoned for a redisseisin or post disseisin upon the statute of Merton, he could have obtained his liberty by the writ *de homine replegiando*, but by the statute of Marlbridge, c. 8, it is enacted, that he shall not be delivered without special commandment of the king, and shall make fine with the king for his trespass. Upon this statute, therefore, he must remove the record into the King's Bench by *certiorari*, where, having made fine, he is to have a writ for his delivery, reciting the special matter, which is the commandment meant by the act. (*d*) If the sheriff delivers a redisseisor contrary to this statute he may be amerced. (*e*)

The statute of Westminster 2, c. 26, gives double damages both in redisseisin and post disseisin. The jury find the single damages, and the court doubles them. (*f*)

If the sheriff neglects to execute the writ of redisseisin or post disseisin, an alias and pluries issue, and, if he still refuses, an attachment directed to the coroners, and, upon that, distress infinite. (*g*)

In a writ of redisseisin the tenant may plead in abatement, as jointenancy, or in bar, as a release, or the like, or give it in evidence. (*h*)

Of assise of nuisance.

The assise of nuisance is now entirely obsolete, having been superseded by the action of the case. It lay where a nuisance

(*a*) F. N. B. 191 A, and see post, in "Pleas in Abatement."
(*b*) 2 Inst. 83.
(*c*) Ante, p. 72.
(*d*) 2 Inst. 115. F. N. B. 190 F.
(*e*) F. N. B. 189 C.
(*f*) F. N. B. 189 C. 2 Inst. 416.
(*g*) F. N. B. 188 I, 190 A.
(*h*) 2 Inst. 83.

Of assise of nuisance.

was committed to the freehold of the plaintiff, of which he was seised for life, in tail, or in fee. (*a*) It appears, that for a mere omission, an assise of nuisance could not be maintained, but the plaintiff was compelled to resort to his action on the case. (*b*)

Of assise of *darrein presentment*.

An assise of ***darrein presentment*** lies for tenant in fee, or in tail, when he or his ancestors have presented to a church, and the clerk has been instituted, and the plaintiff is afterwards hindered in presenting to the same church. So it lies for tenant for life, or years, if he has himself presented. (*c*) This action is now entirely disused, a ***quare impedit*** being the proper remedy for a disturbance in presenting to a church, since that writ may be maintained wherever an assise of ***darrein presentment*** may, though the converse is not true. (*d*) Thus, a ***darrein presentment*** can only be brought where the plaintiff or some of his ancestors have already presented to the church, while a ***quare impedit*** lies for a purchaser who has never presented. (*e*) So to maintain a ***darrein presentment***, it is necessary, that the plaintiff should have the same estate, or a portion of the same estate, by which the former presentment was made (*f*), which is not required in a ***quare impedit***. On this account it is the safer course to bring a ***quare impedit*** upon any disturbance, and it will not, therefore, be necessary to add any thing further respecting the assise of ***darrein presentment***.

Of assise of *juris utrum*.

Another species of assise is the writ of ***juris utrum***, or as it is sometimes called, the ***assisa utrum***. It is a writ of the highest nature that a parson can have, and is, therefore, sometimes termed his writ of right. (*g*) It lies for a parson or prebendary at common law, and by statute 14 Ed. 3, stat. 1, c. 17, for a vicar or warden of a chapel, &c., where the lands or tenements are aliened by his predecessor, or where a recovery is had against

(*a*) F. N. B. 183 I. Com. Dig. Action on the case for Nuisance (B.)(D. 1).

(*b*) F. N. B. 183 N, note (*a*).

(*c*) Wats. Clerg. Law, 241. F. N. B. 31 G. Com. Dig. *Quare impedit*, (C).

(*d*) Wats. Clerg. Law, 241, 2.

(*e*) Wats. Clerg. Law, 241, and see post, "*Quare impedit*."

(*f*) Keilway, 118, b. Wats. Clerg. Law, 241.

(*g*) Br. Ab. *Juris Utr.* 4. F. N. B. 48, 50 G. Com. Dig. *Quare Imp.* (E.)

the predecessor by default or reddition, or by verdict, on his neglect to pray in aid, or after a disseisin to the predecessor, or upon an abatement after his death. But, if a recovery is by action tried after aid prayer, and joinder in aid of the patron and ordinary, or, if the patron and ordinary after aid, render the land, or confess the action, the successor cannot have a *juris utrum*. (*a*) If the parson joins the *mise* on the mere right, without praying in aid, in a writ of right, and loses by verdict, the successor, it seems, cannot have a *juris utrum*. (*b*)

Of assise of *juris utrum*.

A parson may have a possessory remedy for a disseisin done to himself; but, if it was done to his predecessor, he must resort to a *juris utrum*. (*c*)

Where two prebendaries make one parson of a church, they must join in a *juris utrum* (*d*), but, where one man is parson of one moiety of the church, and another, parson of the other moiety, then one of them may have a *juris utrum* alone. (*e*) The plaintiff in a *juris utrum* should be named parson, vicar, &c., according to the character in right of which he sues; thus, a bishop who brings a *juris utrum* for land parcel of a rectory annexed to the bishopric, should name himself parson. (*f*) One *juris utrum* may be brought against several tenants. (*g*)

The process in this action is a summons, and, if on the return of the summons, the tenant makes default, a resummons shall be awarded, and, upon another default, the jury is taken. (*h*) No essoign lies after appearance. (*i*)

The writ of *juris utrum* has become obsolete, principally by reason of the disabling statute of 13 Eliz. c. 10.

A writ of assise of *mortd'ancestor*, which is a possessory writ, founded upon the possession of the ancestor, lies for the heir, where his father, mother, brother, sister, uncle, aunt, nephew, or niece, is seised in fee of any lands, tenements, or rents, or of a corody issuing out of lands, and dies, being so seised on the

Of assise of *mortd'ancestor*.

(*a*) F. N. B. 49, R, A. Reg. Br. 32, b. Booth, 221.
(*b*) F. N. B. 50 D, contra after default, Ferrar's Case, 6 Rep. 8, a.
(*c*) F. N. B. 49 B.
(*d*) F. N. B. 49 O.
(*e*) F. N. B. 49 P.
(*f*) F. N. B. 50 H, I.
(*g*) F. N. B. 49 M, N.
(*h*) F. N. B. 50, K, but see Co. Ent. 401, a. where the jury is taken without a resummons.
(*i*) Vide post.

Of assise of *mortd'ancestor.*

day of his or her death, and a stranger, after such death abates. (*a*) If the ancestor is seised at any time of the day on which he dies, it is sufficient, though he is afterwards disseised, for the words of the writ are, "if he was seised on the day of his death" (*b*); and, in one case, a *mortd'ancestor* was held to lie for a younger brother, where the eldest had been absent out of the realm for several years, although he was not dead. (*c*) As ejectment may be brought by an heir-at-law against an abator, the writ of *mortd'ancestor* has now become useless.

By the statute of Gloucester, 6 Ed. 1, c. 3, where a tenant by the curtesy aliens his wife's inheritance, and dies, the heir of the wife shall have an assise of *mortd'ancestor* (*d*), unless he has assets by descent from the tenant by the curtesy, and this as well where the wife was not seised of the lands on the day of her death, as where she was so seised. At common law, confirmed by the statute of Gloucester, c. 6, if the ancestor dies, leaving several heirs not in the same degree, as aunt and niece, they may join in a writ of *mortd'ancestor*, and, if one of the heirs is entitled by propinquity to this writ, it is immaterial however remote the other be. (*e*) It is necessary, however, that the right upon which the several heirs are suing should descend from one and the same ancestor, for otherwise they must sue severally, as for instance, if two coparceners die seised, and a stranger abates, the daughter of the one, and the granddaughter of the other cannot recover in one writ of *mortd'ancestor*, but the daughter must bring an assise of *mortd'ancestor*, and the granddaughter a writ of aiel. (*f*) So if two coparceners are disseised, and one has issue, and dies, the aunt and the niece, i. e. the surviving coparcener and the issue of the deceased, cannot join in a writ, for they have not one right, and, therefore, they must have several actions, but, when they have recovered, they shall hold again in coparcenary. (*g*) The statute of Gloucester extends to heirs in gavelkind. (*h*) If the aunt and the niece bring a *mortd'ancestor* on the dying seised of the father

(*a*) F. N. B. 195 C, D. Booth, 206. Com. Dig. Assise, (C. 1). 2 Inst. 400.

(*b*) F. N. B. 195 D. Br. Ab. Cosinage, 1.

(*c*) F. N. B. 196 L. Com. Dig. Assise, (C. 1).

(*d*) F. N. B. 196 E. 2 Inst. 292, 3, and other actions, as writs of right, formedon, entry, &c. are within the statute, 2 Inst. 293.

(*e*) 2 Inst. 307, 8. Co. Litt. 164, a. Thel. Dig. l. 2, c. 1.

(*f*) 2 Inst. 308. Co. Litt. 164, a. ante, p. 7.

(*g*) 2 Inst. 308.

(*h*) Ibid.

Of assise of *mortd'ancestor.*

of the one, and the grandfather of the other, and the aunt is summoned and severed, yet the niece may proceed and recover a moiety, (although alone she could not have had a writ of *mortd'ancestor,*) because the writ was rightly commenced, and, when the niece has recovered, the aunt may enter and enjoy the moiety with her. (*a*)

If the ancestor is seised in tail, remainder to himself in fee, and dies without issue of his body, and a stranger abates, a writ of *mortd'ancestor* will not lie, as it is said, because the ancestor was not, according to the words of the writ "seised in his demesne as of fee, the day whereon he died." (*b*) And so it is said, that if two men are seised to them and to the heirs of one of them, and he who has the fee dies, and then the other dies, the heir of the former shall not have a writ of *mortd'ancestor*, because the fee was never executed in possession. (*c*) A *mortd'ancestor* lies only on the death of the ancestor within the degrees which have been mentioned; out of those degrees a writ of *aiel, besaiel, tresaiel,* or *cosinage,* lies according to the nature of the case, and, if a *mortd'ancestor* be brought, the matter may be pleaded in abatement. (*d*) So *mortd'ancestor* is only sustainable on a disseisin or abatement by a *stranger,* for, if the injury be committed by a parcener, a *nuper obiit* lies (*e*), the form of the writ of *mortd'ancestor* rendering it inapplicable *inter conjunctas personas,* as privies in blood (*f*), and this rule holds even between bastard *eigné,* and *mulier puisné.* (*g*)

Before the statute of wills a writ of *mortd'ancestor* did not lie where lands were devisable by will, because, by operation of the will, the right and title might be in another, who was not heir, and the plaintiff, although he proved the points of the writ, viz., that his ancestor died seised, and that he was his next heir, might yet not be entitled to recover. (*h*) Hence it should appear, that since the statutes of 32 Hen. 8, and 12 Car. 2, whereby all lands are rendered devisable, the writ of *mortd'ancestor* has become

(*a*) Ibid, and see post, in "Summons and Severance."

(*b*) F. N. B. 196 K. Com. Dig. Assise, (C. 1,) but such seisin is sufficient to maintain a writ of right. Co. Litt. 281, a. ante, p. 22.

(*c*) Br. Ab. Mortd. 59, see Co. Litt. 281, a.

(*d*) Vide post, in "Pleas in Abatement."

(*e*) F. N. B. 196 L, and see in "Nuper Obiit," post.

(*f*) Co Litt. 242, a.

(*g*) Co. Litt. 244, b.

(*h*) F. N. B. 196 I. 3 Bl. Com. 187.

Of assise of *mortd'ancestor.*

totally useless, and, that where an ejectment cannot be brought, recourse must be had to a writ of entry *sur abatement.* (*a*)

The process in *mortd'ancestor* is summons and resummons, and then the assise may be taken by default. The demandant and tenant may be essoigned before appearance, but not afterwards. A view lies by the jury. Voucher, receit, and aid-prayer lie. On the trial three points shall be inquired into. 1. Whether the ancestor died seised the day of his death. 2. Whether he died seised within the time of limitation, (fifty years). 3. Whether the plaintiff is next heir. (*b*)

(*a*) 3 Bl. Com. 187, but see 1 Leon. 267. Booth, 208.

(*b*) See under the proper heads post.

Of Writs of Entry.

A RIGHT of entry is where a man, who has the possession of lands, is disseised, or ousted, or having a right to the possession, is kept out of the possession, in which case he has the right of peaceably making an actual entry upon the lands, or of bringing an ejectment or a real action, to restore himself to the possession. Of entry generally.

If the lands lie in several towns in the same county, and he who has a right of entry enters into parcel in one town in the name of the rest, this is a sufficient entry into the rest (*a*); but, if the lands lie in several counties, there must be several entries (*b*), and, if a man is disseised by the same disseisor of two several acres at two several times in one county, and enters into one of them in the name of both, this revests both the acres; but, if he had only entered generally into one acre, without saying in the name of both, that acre alone would have been revested. (*c*) The rule is, that the entry of a man to recontinue his inheritance must ensue his action for the recovery of the same. Therefore, if three men disseise another, severally, of three several acres of land in one county, and the disseisee enters into one acre in the name of the rest, this is only good for the acre entered into; for every disseisor has a several freehold, and the disseisee must bring several actions. (*d*) So if a man is disseised of three acres of land, and the disseisor leases these three several acres to three several men for their lives, the entry of the disseisee upon one of the lessees is not good for the rest, but, if the disseisor had let these three several acres to three several men for years, an entry into one in the name of all would revest the whole. (*e*) In what manner to be made.

There is a distinction (*f*) with regard to the efficacy of an entry upon part, between a right of entry after a disseisin, &c.,

(*a*) Litt. s. 417. Vin. Ab. Entry (B). 738.
(*b*) Co. Litt. 252, b. Perkins, s. 229. Br. Ab. Entre Cong. 35.
(*c*) Co. Litt. 252, b. Perkins, s. 232.
(*d*) Co. Litt. 252, b. 1 Rol. Ab.
(*e*) Co. Litt. 252, b. Dyer, 337, b. margin. Holland v. Hopkins, 4 Leon. 8.
(*f*) Co. Litt. 252, b. 15, b.

Of entry generally.

and a title of entry by force of a condition, for, if a man disseises another of one acre at one time, and afterwards of another acre in the same county at another time, an entry into one in the name of both is good; but, if a man enfeoffs another of one acre upon condition, and, at another time, enfeoffs the same man of another acre in the same county upon condition also, and both the conditions are broken, an entry into one acre in the name of both is not sufficient, because the feoffor has no right to the land, nor any action to recover the same (*a*), but a bare title, and, therefore, several entries must be made in respect of the several conditions: but, if the land be all subject to one condition, an entry into part in the name of the whole is good, although the parcels be several, and in several towns.

Where the possession is in no one, and the heir having the freehold in law, makes a *general entry*, not expressly in the name of the whole, such entry will reduce all the lands into his actual possession, although they lie in several parcels. (*b*)

The mere act of entering upon the land is not sufficient to vest the possession in the party entering, but he must enter with that intent. (*c*)

To the use of another.

If a man, whether an infant, or of full age, has a right of entry into lands, a stranger may enter into the lands in his name, and to his use, and this will vest the lands in him who has the right of entry, without any commandment precedent, or agreement subsequent; but, if there is a fine levied with proclamations according to the statute, a stranger, without a commandment precedent, or agreement subsequent within the five years, cannot enter, so as to avoid the fine, but a subsequent assent within the five years is sufficient. (*d*) A guardian by nurture, or in socage, may enter in the name of his ward, without any command or assent. (*e*) So also the remainderman and reversioner, and lord of a copyhold, may enter in the name of the tenant for life, for years, or by copy, or those particular tenants may enter

(*a*) No real action lies in such a case, and, although ejectment may be brought without an actual entry, that is only by reason of the confession of an entry. After an actual entry made, or recovery in ejectment, if he who has entered or recovered be disseised, he may have an assise, or other real remedy.

(*b*) Co. Litt. 15, b.

(*c*) Co. Litt. 245, b. Plowd. 92, 93. Watk. on Desc. 46.

(*d*) Br. Ab. Seisin, 50. Co. Litt. 258, a. Lord Audley's Case cited, 9 Rep. 106, a. Cro. Eliz. 561. Moor, 450, S. C. Fitchett v. Adams, 2 Strange, 1128. Watk. on Desc. 56, 57.

(*e*) Co. Litt. 15, a. Newman v. Newman, 3 Wils. 516. Margaret Podger's Case, 9 Rep. 106, a. Watk. on Desc. 48.

in the name of the reversioner, remainderman, or lord, without any command or assent, on account of the privity between those persons, and may thus avoid a fine levied with proclamations. (*a*) Of entry generally.

As an actual entry is not necessary before bringing a real action to avoid a fine levied with proclamations (*b*), the law with respect to such entry, will be stated in a subsequent part of the present volume, in treating of the action of ejectment.

As it can never be necessary to resort to a writ of entry, where a right of entry exists, and an action of ejectment may be brought, it will be material to consider in what cases a right of entry is tolled or taken away by descent. (*c*) Entry tolled by descent.

In ancient times, if a disseisor had continued long in possession, or if the feoffee of the disseisor had remained a year and a day in possession, the entry of the disseisee was in both cases tolled. (*d*) This law, however, soon became obsolete, but it was still held that where a man comes in by disseisin, abatement, or intrusion, or by the feoffment, gift, &c. of a disseisor, and dies seised, the descent to his heir will take away the entry of him who has right. (*e*) A descent either in fee or in tail will toll the entry (*f*), into all corporeal hereditaments which lie in livery (*g*), and if the person who dies seised had only a seisin in law, it is sufficient (*h*); and it is the same thing whether the land descends to the heir lineal or collateral. (*i*)

But a descent does not take away an entry, if he who died seised had only an estate for life. (*k*) So if a disseisor leases to B. and his heirs, for the life of A., and B. dies seised, and his heir enters; for the heir takes only to prevent an occupancy. (*l*) So if a man disseises the tenant for life of the king; for he gains nothing but an estate for the life of the lessee. (*m*) A descent does not take away an entry where a man dies seised

(*a*) Margaret Podger's Case, 9 Rep. 106, a. But *quære* as to tenant for life. Co. Litt. 250, b.

(*b*) 1 Saund. 261, a, note.

(*c*) If the doctrine of Lord Mansfield, in Atkins v. Horde, 1 Burr. 60, be correct, it cannot be necessary to resort to a writ of entry in consequence of a descent cast, for the plaintiff may elect not to be disseised, and unless there be a disseisin, the descent cannot toll the entry.

(*d*) Bracton, 162, b. 163, a, b. 1 Reeves' Hist. 323. Co. Litt. 237, b. Gilb. Ten. 43.

(*e*) Co. Litt. 237, b. Com. Dig. Descent, (D. 1.) Bac. Ab. Descent, G.

(*f*) Litt. s. 385, 386.

(*g*) Co. Litt. 237, b.

(*h*) Ib. 239, b.

(*i*) Litt. s. 389.

(*k*) Litt. s. 387.

(*l*) Co. Litt. 239, a

(*m*) Ibid.

Of entry generally.

When tolled.

of a reversion or remainder, after an estate of freehold (*a*); but if a disseisor makes a lease for years, or if the land is extended upon a statute, judgment, or recognisance, and the disseisor dies seised, this will toll the entry, for the lessor or conusor is seised of the fee and freehold. (*b*)

If a disseisor leases for his own life and dies, though the fee and freehold descend to his heir, yet the disseisor only died seised of the reversion, and therefore the descent is not tolled. (*c*)

Incorporeal hereditaments.

The descent of incorporeal hereditaments which lie in grant as an advowson, rent, or common in gross, will not take away a right of entry (*d*), because no disseisin can be committed of them, but at the election of the owner.

The ancestor and heir must be seised of the same estate.

If the ancestor does not die seised of the same estate which the heir has by descent, the entry is not taken away; as if a disseisor makes a gift in tail, and the donee discontinues in fee, and then disseises the discontinuee and dies seised, the issue in tail is in by remitter, and not of the estate in fee, of which the father died seised. (*e*)

Escheat and succession do not toll the entry.

If the land escheats upon the death of the disseisor or his feoffee without issue, this will not take away the entry, for there is no descent. But if the lord by escheat dies seised, and this land descends to his heir, the entry is gone. (*f*) And where the tenements come to another by succession, as in the case of bishops, abbots, priors, deans, parsons, and other bodies politic, a dying seised shall not deprive a man of his entry. (*g*)

The descent must be immediate to toll an entry.

The descent must be immediate, thus if a woman disseisoress takes husband, has issue, and dies seised, and the husband is tenant by the curtesy and dies, the descent to the issue does not toll the entry (*h*); and if a disseisor dies seised, his wife *privement enceint*, the descent to the son afterwards born, does not take away the entry. (*i*)

Where the descent is avoided.

Whenever the descent is avoided, which may happen in various ways, the disseisee is remitted to his right of entry, as where the heir, after a descent, enters and endows his mother, as to this

(*a*) Litt. s. 388. Gilb. Ten. 29. Watk. Desc. 137, Note.
(*b*) Co. Litt. 239, b.
(*c*) Co. Litt. 239, b.
(*d*) Co. Litt. 237, b. Com. Dig. Descent, (D. 3).
(*e*) Co. Litt, 238, b. Com. Dig, Descent, (D. 4).
(*f*) Litt. s. 390. Co. Litt. 239, b.
(*g*) Litt. s. 416. Co. Litt. 250, a.
(*h*) Litt. s. 394, Carter v. Tash, 1 Salk. 241.
(*i*) Co. Litt. 241, b.

third part the seisin of the heir is avoided *ab initio*, and the descent defeated. (*a*) So if the disseisor makes a feoffment in fee upon condition, and the feoffee dies seised of such estate, now the disseisee cannot enter; but if the condition is broken and the disseisor enters, the disseisee may enter upon him. (*b*) And so if a disseisor, after a descent, acquires the same land again by descent, or purchase of an estate of freehold, the right of entry is revived; as if a disseisor enfeoffs his father, who afterwards dies seised, and the land descends to the disseisor as his heir (*c*); or if he enfeoffs his grandfather, and the land descends to his father and afterwards to himself. (*d*) So if the father, after the descent, leases the lands to his son, the disseisor, *pur autre vie*. (*e*) If a disseisor makes a gift in tail, and the donee has issue and dies seised, the entry of the disseisee is taken away; but if the issue die without issue, whereby the estate tail is spent, the entry of the disseisee is revived, and he may enter upon him in reversion or remainder. (*f*)

Of entry generally.

When tolled.

An entry is not tolled where he who had the right was an infant at the time of the descent (*g*); but if he had not a right of entry at the time of the descent, as if a man dies, his wife *privement enseint*, and B. abates and dies seised, and a son is born, he shall be bound by the descent. (*h*) And so an infant shall be bound by a descent from the king. (*i*) An infant after a descent cast during his nonage, need not enter immediately upon attaining his full age, but ought not to let another descent be cast after his full age and before entry. (*k*)

In case of infancy.

When a *feme covert* is disseised by one who dies seised during the coverture, her entry is not tolled after the death of her husband. (*l*)

Or of coverture.

But if a woman of full age is disseised and afterwards marries, a descent during the coverture tolls her entry, for it is her own folly that she did not enter before marriage, and that she took a

(*a*) Litt. s. 393. Com. Dig. Descent, (D. 5). Watk. on Descents, 65. Gilb. Ten. 27. Vin. Ab. Descent, (N. 9).

(*b*) Litt. s. 409. Gilb. Ten. 33.

(*c*) Litt. s. 595. Gilb. Ten. 27, 28.

(*d*) Co. Litt. 238, b.

(*e*) Ibid.

(*f*) Ibid.

(*g*) Litt. s. 402. Gilb. Ten. 28, 29. Vin. Ab. Descent, (N. 7).

(*h*) Co. Litt. 245, b.

(*i*) Co. Litt. 246, a.

(*k*) Chudleigh's Case, 1 Rep. 140, a. Co. Litt. 245, b. note (1).

(*l*) Litt. s. 403. Com. Dig. Descent, (D. 8). Gilb. Ten. 32.

Of entry generally.

When tolled.

husband who would not make an entry. (*a*) So if a *feme covert* is disseised, and her husband dies, and before a descent she takes another husband. (*b*) A descent during the coverture bars the entry of the husband, although the wife after his death may enter. (*c*)

Non compos, in prison or broad.

Where a person is non-sane at the time of a descent cast, though it is said that his own entry is tolled, because he cannot disable himself, yet after his death his heir may enter. (*d*) And if a man is imprisoned, and is disseised, and the disseisor dies seised, the disseisee still being in prison, his entry is not tolled. (*e*) If a man is out of the realm at the time of a disseisin done to him, and a descent is cast, he being still out of the realm, he may enter on his return. (*f*)

Title of entry for condition broken.

A descent does not toll a title of entry for a condition broken, &c. and the reason is, that if the right of entry were taken away, the party would have no other remedy. (*g*) The entry is preserved though the feoffee upon condition is disseised, and the disseisor dies seised, and the land descends to his heir before the condition broken. (*h*) So a descent does not toll a title to enter for an alienation in mortmain. (*i*)

Entry of devisee not tolled.

So also a descent cast, will not take away the entry of a devisee, for he would otherwise be without remedy. (*k*)

Abatement by younger son.

If a younger son enters by abatement after the death of his father, and dies seised, the descent does not toll the entry of the eldest son, who claims by the same title, for it shall be intended that the younger son claimed as heir; and this is also the case although the younger son is only of the half blood (*l*), or if he enters by intrusion. (*m*)

But if the younger son makes a feoffment in fee and the feoffee dies seised, this descent shall toll the entry of the eldest

(*a*) Co. Litt. 246, a.

(*b*) Carter v. Tash, 1 Salk. 241.

(*c*) Litt. s. 403.

(*d*) Litt. s. 405. Co. Litt. 247, a. note (2). Gilb. Ten. 32. And see *post*, "*Dum fuit non compos*," &c. p. 92.

(*e*) Litt. s. 436. *post*, p. 93.

(*f*) Litt. s. 439, 440. Co. Litt. 260, b. 261, a.

(*g*) Litt. s. 391. Co. Litt. 339, b. Owen, 141; for no real action lies in such case.

(*h*) Litt. 392. Co. Litt. 340, b.

(*i*) Co. Litt. 240, b. Seymour's Case, 10 Rep. 98, b.

(*k*) Co. Litt. 240, b. The writ *ex gravi querelâ* lay only where lands were devisable by custom. Co. Litt. 111, a. F. N. B. 198 L. and it should seem not to extend to lands devisable by the statute of wills, Matthewson v. Trott, Owen, 141.

(*l*) Litt. s. 396. Co. Litt. 242, b.

(*m*) Ibid. 243, a.

son, because the privity of blood fails. (*a*) And if after the death of the father the eldest son enters, and the younger son disseises him, and has issue, and dies seised, this will toll the elder son's entry, because it cannot be intended that by this wrongful act, the younger son claims as heir to his father. (*b*) So also if the younger son enters when the father had made a lease for years, for the possession of the tenant for years is the possession of the eldest son. (*c*)

Of entry generally.

When tolled.

If one parcener enters, claiming the whole estate, it does not toll the entry of the other parcener, because they claim by one and the same title. (*d*)

Parceners.

If there is lessee for years, and the lessor is disseised, and the termor ousted, and the disseisee dies seised, and the lands descend to his heir, in this case although the entry of the lessor is taken away, yet the termor may enter, because his entry does not disturb the freehold, which is in the heir of the disseisor. (*e*) And so in the case of tenant by statute merchant, or *elegit*, who has only a chattel interest. (*f*) If the termor enters before the descent, he revests the freehold of the disseisee, who has the right of possession to the immediate freehold; but if he re-enters *after* the descent, then he can only hold in the name of the freeholder who has the present right of possession, viz. the heir of the disseisor. (*g*)

Entry of lessee for years not tolled.

The effect of a descent cast may be defeated by the act of the disseisee in making claim to the lands of which he has been disseised; for if a man is disseised, and the disseisor continues in possession for many years, without any claim by the disseisee, yet if the latter makes his claim at any time before the death of the disseisor, it shall save his entry, for a year and a day after such claim made, to be computed from the day of the claim inclusive, notwithstanding any descent cast in that time; but if he suffers the year and day, after the claim made, to elapse, a descent afterwards will bind him. (*h*) A descent from a feoffee of the disseisor does not take away the entry of him who makes continual claim. (*i*)

Continual claim.

(*a*) Co. Litt. 242, b. Gilb. Ten. 29.
(*b*) Litt. s. 397. Gilb. Ten. 29.
(*c*) Co. Litt. 243, a.
(*d*) Litt. s. 398. Fisher v. Prosser, Cowp. 218. Small v. Dale, Hob. 120. Gilb. Ten. 29. Wark. Desc. 52.
(*e*) Litt. s. 411. Gilb. Ten. 34.
(*f*) Co. Litt. 249, a.
(*g*) Gilb. Ten. 35.
(*h*) Litt. s. 427, 428, &c. Co. Litt. 255, a. Com. Dig. Claim, (A. 1). Bac. Ab. Descent, (I. 3). Gilb. Ten. 37.
(*i*) Co. Litt. 251, a.

Of entry generally.

Continual claim.

Continual claim has the same effect as an entry; and the continuance in possession of the disseisor is a new disseisin; if, therefore, the donee in tail of the disseisor is in possession at the time of the claim made, and after such claim made continues his occupation of the lands, this is a fresh disseisin, and consequently the tenant in tail acquires a new estate in fee. (*a*)

How made.

In making continual claim, a man ought to go to the land, or parcel of it, if he dare (*b*), and make his claim upon the land (*c*); but if he dare not for fear of death, battery, mayhem, or imprisonment, he ought to go as near to the land as he dare, and make his claim. (*d*)

If a person who has a right of entry commands his servant to make claim, and the servant goes to the land and makes the claim, it is sufficient, for he does all that his master ought to do in such case. And if the master dare not go nearer the land than D. and commands his servant to go to D. and make claim, and the servant does so, this also is sufficient. But if the master, being in good health, commands his servant to make the claim, who dares not for fear of death enter upon the land, but makes claim as near thereto as he dares, this claim is void, for the servant has done less than he was expressly commanded to do. (*e*) Though if the master was languishing or decrepid, it would be otherwise. (*f*)

Continual claim ought to be made by him who has title to enter. (*g*) And if lands are let for life, remainder for life, remainder in fee, and tenant for life aliens in fee, and the remainderman for life makes continual claim before the death of the alienee, and then the alienee dies seised, and the remainderman for life dies likewise without any entry; yet in this case, he in the remainder in fee may enter by virtue of the continual claim made by the remainderman for life; for since the efficacy of this continual claim, if there had been a subsequent entry made by the remainderman for life, would have extended to the remainder in fee by revesting that too, it is but reasonable to allow the remainderman in fee a power of entry under such continual claim, especially since by reason of the intermediate remainder he could

(*a*) Litt. s. 429.
(*b*) Litt. s. 421.
(*c*) Ford v. Grey, 1 Salk. 285. 6 Mod. 44, S. C.
(*d*) Litt. s. 419. Co. Litt. 253, b.
(*e*) Litt. s. 433, 435. Co. Litt. 259, a.
(*f*) Litt. s. 434.
(*g*) Litt. s. 416.

not himself make continual claim. (*a*) If tenant for years, by *elegit*, &c. is ousted, and he in reversion disseised, the latter may enter to make his claim, though as to the taking of the profits such entry is not lawful during the term. (*b*) If the father is disseised and there is a claim by him, and a descent cast in his lifetime, his heir may enter; but it is otherwise if the descent is cast in the son's time. (*c*)

Of entry generally.

Continual claim.

By statute 32 Hen. 8, c. 33, it is enacted, that except a disseisor has had the peaceable possession of the land, &c. whereof he shall die seised, by the space of five years next after the disseisin, &c. without entry or continual claim, &c. such dying seised &c. shall not take away the entry of the person or persons lawfully entitled. After the five years the disseisee, if he intends to preserve his right of entry, must make continual claim as at common law. (*d*) As this statute is penal in its enactments, it has been said not to extend to abators or intruders (*e*), and it does not extend to a feoffee of a disseisor. (*f*) The successors of a body politic are within the benefit of this statute. (*g*)

Stat. 32 H. 8.

If a man makes a lease for life, and the lessee for life is disseised, and the disseisor dies within five years, the lessee for life may enter; but if he dies before entry, it is said that the entry of him in the reversion is not lawful, because his entry was not lawful upon the disseisor at the time of the descent, as the statute requires. Though if the lessee for life had died first, and then the disseisor had died seised, he in the reversion would be within the remedy of the statute, because he had title of entry at the time of the descent, as the statute requires, although the disseisin was not immediate to him; and the same law of a remainder. (*h*)

It seems that a right of entry is not devisable. (*i*)

(*a*) Litt. s. 416. Co. Litt. 253, a. Bac. Ab. Descent, (I. 1).

(*b*) Co. Litt. 250, b. *quære* as to reversioner upon estate for life making claim, Co. Litt. 250, b.

(*c*) Co. Litt. 250, b.

(*d*) Co. Litt. 238, a.

(*e*) Ibid. and by Saunders counsel in Wimbish v. Talbois, 1 Plow. Com. 47.

(*f*) Co. Litt. 238, a.

(*g*) Ibid.

(*h*) Ibid.

(*i*) Atty. Genl. v. Vigor, 8 Ves. 282. See Pouseley v. Blackman, Palm. 201. Cro. Jac. 659. 2 Rol. R. 284, S.C. and Mr. Preston's comments upon that Case, Goodright v. Forrester, 1 Taunt. 598.

Of writs of entry in general.

Anciently, it appears to have been necessary in every case, where a man was deprived of his power of entry, to resort to a writ of right. (*a*) In Glanville's time the writ of entry was unknown, and the earliest mention which we meet with of this possessory remedy is in the third year of Henry 3. (*b*) It has been supposed that the writ of entry was first introduced soon after the time of Glanville (*c*), but at this period it could only be brought within the degrees, that is where the land by descent or alienation had not been transferred more than twice. By the statute of Marlbridge, c. 30, the writ of entry in the post was given in cases of alienation beyond the degrees (*d*); but it lay at common law against such persons as came in originally in the post as intruders, &c. (*e*)

Various kinds.

Writs of entry are of various kinds, according to the nature of the injuries which they are intended to redress, as, 1, Writs of entry *sur disseisin*, where a disseisin has been done to the demandant, or to some of his ancestors. 2, Writs of entry *sur alienation*, where the tenant of a particular estate wrongfully aliens it, which is a deforcement to the reversioner, &c. or formerly where a husband seised in right of his wife wrongfully aliened her estate, which was then a discontinuance; and so when an abbot without the assent of his chapter aliened, which was also a discontinuance. 3, Writs of entry *sur intrusion*, where, on the expiration of a preceding estate of freehold, a stranger wrongfully intrudes, which is a deforcement to the reversioner. A fourth class of writs of entry may be added, viz. writs of entry *sur abatement*, where, on the death of the ancestor, a stranger abates and deforces the heir. In this case, the proper remedy for the heir was formerly an assise of *mortd'ancestor*, or a writ of *ayel*, &c. There does not, however, appear to be any objection to resorting to a writ of entry in this case, and indeed it may be necessary to do so, if, as it has sometimes been supposed (*f*), an assise of *mortd'ancestor* is no longer maintainable. (*g*)

The degrees.

As the form of the writ depends upon the number of *degrees* which the tenant is distant from the original wrong-doer, it will be proper to state what is the nature of those degrees. The

(*a*) Gilb. Ten. 47, 49.
(*b*) Bracton, 219, a.
(*c*) 1 Reeves' Hist. 349.
(*d*) 2 Inst. 153. Gilb. Ten. 49.
(*e*) 2 Inst. 153.
(*f*) 3 Bl. Com. 187. *ante*, p 77.
(*g*) A writ of entry *sur abatement* was brought as late as the year 1795, by the Assignees of a Bankrupt. Smith v. Coffin, 2 H. Bl. 444.

Of writs of entry in general.

first degree is, where the wrong-doer has made a feoffment, or other conveyance in fee, in tail, or for life, in which case the feoffee, &c. is said to be *in* in the *per* (*a*), and so when lands descend to an heir, the latter is *in* in the *per* (*b*), and in this respect there is a distinction between descent and succession, for the successor of a body politic is *in* in the *post*. (*c*) The second degree is the *per and cui*, and is when the tenant comes in immediately under the heir or alienee of the first party, as in the case of a second feoffment. (*d*) The tenant in this case is said not to have entry but *by* the prior alienee *to whom* the disseisor, &c. demised. The writ of entry in the *post* is the most comprehensive of all the writs of entry, for every tenant, who is not within the two former classes, is said to be out of the degrees, and to be *in* in the *post*. In general we have seen that an alienation makes a degree (*e*), and, that the alienee is *in* by the alienor in the *per*, but there are some special cases in which an alienation does not make a degree. Thus, the king's charter is so high matter of record, that it makes no degree, and, therefore, if a disseisor, by deed enrolled, conveys the land to the king, and the king by charter grants it over, the disseisee must have a writ of entry in the *post*, and not in the *per and cui* (*f*); and so the alienation in law, which takes place on the succession of a spiritual person, as a bishop, does not make a degree. (*g*) In general, a person who comes in by act of law (except in the case of the heir by descent) is accounted *in* in the *post*. Thus, the lord by escheat, who is in merely by act of law, is *in* in the *post* (*h*), and so is a person, who is in by judgment, which is also an act of law. (*i*) It is likewise said, that the recoveror in a common recovery is *in* in the *post* (*k*), for he is in by judgment, but it must

Per.

Per and cui.

Post.

(*a*) Co. Litt. 239, a. Booth, indeed, (says Blackstone, 3 Com. 181.) makes the first degree to consist in the original wrong done. Booth's expression is, "There are four degrees, 1. Against him who had the land by demise, &c. from the demandant himself," and he instances the writ of entry *ad terminum qui præteriit*, p. 171, and see Butler's note, Co. Litt. 239, b. (2.)

(*b*) Co. Litt. 250, a. Finch's Law, 262. 3 Bl. Com. 181.

(*c*) Co. Litt. 250, a.

(*d*) Finch's Law, 262.

(*e*) But a partition makes no degree, and each parcener is *in* by descent from the common ancestor, Co. Litt. 175, a.

(*f*) Co. Litt. 239, a. F. N. B. 191 K.

(*g*) Co. Litt. 239, a. F. N. B. 192 F. Finch's Law, 262. 2 Inst. 154.

(*h*) Co. Litt. 239, a. Finch's Law, 192.

(*i*) Ibid, unless in case of judgment to recover in value when he is said to be *in* in the *per*. Keilw. 124.

(*k*) Co. Litt. 239, a. Finch's Law, 192.

Of writs of entry in general.

be observed, that a distinction is to be taken between those cases where a man is *in* simply by act of law, as the lord by escheat, and where he is *in*, also, by the act of the party, as the recoveror in a common recovery. (*a*) And so of *cestui que use*, although he comes in by act of law, viz. by operation of the statute of uses, and is, therefore, in strictness, *in* in the *post* (*b*), yet, as he is *in* substantially by the act of the party, he is sometimes said to be *in* partly in the *per*, and partly in the *post*. (*c*) The same distinction occurs in the case of tenant in dower, who appears to be partly in by the baron, and partly by act of law (*d*), although she is sometimes said to be *in* in the *per* by her husband. (*e*) In the case of dower by assignment of a disseisor, the tenant in dower is *in* in the *post* (*f*), and so is a tenant by the curtesy. (*g*) An estate acquired by wrong makes no degree, and, therefore, a person who comes in by abatement, intrusion, or disseisin, is *in* in the *post*. (*h*) Lastly, a third and every subsequent feoffee is *in* in the *post*. (*i*) When the degrees are past, so that it is necessary to resort to a writ of entry in the *post*, yet the tenant may be brought within the degrees again, as when a disseisor enfeoffs A., who enfeoffs B., who enfeoffs C., who reenfeoffs B. (*k*), in which case the demandant may have his writ either in the *per* and *cui*, or in the *post*. (*l*)

A demandant cannot have a writ of entry in the *post*, where he ought to have it within the degrees (*m*), and, if the demandant has mistaken the degree, it may be pleaded in abatement. (*n*)

In general all writs of entry may be brought in the *per*, in the *per* and *cui*, or in the *post*, according to the circumstances, whether they be *sur disseisin*, *sur alienation*, *sur intrusion*, or *sur abatement*. (*o*)

Title of demandant

The quantity and kind of estate in the demandant necessary to support a writ of entry, generally depend on the species of

(*a*) Linc. Coll. Case, 3 Rep. 62, b. Co. Litt. 215, b, and he is an assignee within the statute, 32 H. 8, c. 34, which the lord by escheat is not. Ibid.

(*b*) Co. Litt. 239, a.

(*c*) Shep. Touch. 222.

(*d*) Br. Ab. Feoffee al uses, 10. Park on Dower, 102, 342.

(*e*) Co. Litt. 239, a. Gilb. Uses, 172. 2 Inst. 154.

(*f*) Co. Litt. 239, a.

(*g*) Ibid. Gilb. Uses, 172.

(*h*) Co. Litt. 239, a. Finch's Law, 262.

(*i*) Ibid.

(*k*) Co. Litt. 239, a. 3 Reeves' Hist. 35.

(*l*) 2 Inst. 154.

(*m*) Stat. West. 2, c. 40. F. N. B. 192 C. Booth, 173.

(*n*) Co. Litt. 238, b, and see post in "Pleas in Abatement."

(*o*) Booth, 174.

the writ, and will, therefore, be noticed under the head of each particular writ. Like other real writs it must be brought against the tenant of the freehold, and lies generally for such things as may be demanded in a *præcipe*. (*a*) The process and other incidents to the various writs of entry will be mentioned under each particular head.

Of writs of entry in general.

In modern practice it can never be necessary to resort to a writ of entry, so long as a right of entry is subsisting in the plaintiff, and an ejectment may be brought; but, if such right of entry should be tolled by a descent cast after five years possession by a disseisor, &c., or should be barred by the statute of limitations, it may be adviseable to resort to this species of action in preference to a writ of right.

Of entry *sur disseisin.*

When a man or any of his ancestors has been disseised, he may have a writ of entry to recover the land of which he has been wrongfully deprived. (*b*) When the writ is brought by the disseisee against the disseisor, it is called a writ of entry in nature of an assise, and lies concurrently with the assise of novel disseisin (*c*), though it appears, that anciently no writ of entry lay during the life of the disseisor, an assise of novel disseisin being the proper remedy. (*d*) Writs of entry *sur disseisin* may be brought in the *per*, in the *per* and *cui*, or in the *post*. (*e*)

The master of an hospital, or a bishop, may have a writ of entry on a disseisin done to his predecessor (*f*), and a tenant for life, or tenant in tail on a disseisin done to himself, but in the latter case, the words "which he claims to be his right and inheritance" must be omitted. (*g*) Aunt and niece, coparceners, may have a writ of entry on a disseisin done to their ancestor, the father of the one, and the grandfather of the other. (*h*)

The process in this action is summons and grand cape before appearance, and petit cape after appearance. Essoign lies. Where the action is against the disseisor himself, no view can be had, and in a writ of entry *sur disseisin* against the disseisor himself he cannot vouch. Aid-prayer and receit lie. Damages are in some cases recoverable by the statute of Gloucester, c. 1, and consequently costs also. The limitation, as in other

(*a*) See *ante*, p. 17.
(*b*) Co. Litt. 238, b.
(*c*) Ibid. F. N. B. 191 C.
(*d*) 3 Reeves' Hist. 34.
(*e*) Co. Litt. 238, b. F. N. B. 191 D.
(*f*) F. N. B. 191 F.
(*g*) F. N. B. 191 E.
(*h*) F. N. B. 191 G.

Of entry *sur disseisin.*

writs of entry is fifty years on the seisin or possession of the ancestor, and thirty years on the seisin or possession of the demandant. (*a*)

Of entry *sur intrusion.*

A writ of intrusion lies where tenant for life, in dower, or by the curtesy, dies seised of such estate for life, and after such death, a stranger intrudes upon the land, in which case the reversioner may have this writ against the intruder (*b*), and the grantee of the reversion may likewise have it (*c*), as may also the remainderman or his assignee. (*d*) It seems, that where lands are leased for life, the remainder to another in fee, and the tenant for life aliens in fee or in tail, or for the life of another, and dies, and a stranger abates and deforces the remainderman, a *formedon* in the remainder lies, but not a writ of intrusion. (*e*) If lands are given to two, and the heirs of one of them, and he who has the fee dies, and then the tenant for life dies, the heir of him in remainder may have a writ of intrusion. (*f*) In a very late case a demandant claiming as heir under an executory devise was allowed to recover in a writ of intrusion without objection. (*g*) It can seldom be necessary, at the present day, to resort to the writ of intrusion, unless the plaintiff has been barred of his ejectment by the statute of limitations.

This writ may be brought in the *per*, in the *per* and *cui*, or in the *post*. The process is summons and grand cape before appearance, and petit cape after appearance; and the writ has the other usual incidents of a writ of entry. (*h*)

Of entry *dum fuit non compos mentis.*

It is a disputed point, whether a man who makes a grant while he is *non compos mentis* shall afterwards be permitted to allege his own disability in order to avoid such grant. (*i*) There is no

(*a*) See further, under the proper heads.

(*b*) F. N. B. 203 E. Booth, 181. Co. Litt. 277, a.

(*c*) F. N. B. 203 G, H. 204 C.

(*d*) F. N. B. 204 D.

(*e*) F. N. B. 217 E, or where the tenant aliens, the reversioner, during the tenant's life, may have a writ of entry *in consimili casu*, see *post*, p. 95, and see Widdowson v. Earl of Harrington, 1 Jac. and Walk. 538.

(*f*) F. N. B. 204 E.

(*g*) Eastman v. Baker, 1 Taunt. 174, and see Romilly v. James, 6 Taunt. 263. See the pleadings in Eastman v. Baker, 3 Chitty's Pl. 611.

(*h*) See post, under the proper titles.

(*i*) Litt. s. 406. Co. Litt. 247, a. Beverley's Case, 4 Rep. 123, b. F. N. B. 202 D. 2 Bl. Com. 291. 3 Mod. 301. Shep. Touch. 289.

doubt, however, that the heir, after the death of him who was *non compos mentis*, may either enter or have this writ, which lies where the ancestor has aliened in fee, in tail, for life, or for years. (*a*) As the heir may enter, ejectment is, of course, the remedy adopted in modern practice.

Of entry *dum fuit non compos mentis.*

The action of ejectment has also superseded the writ of entry *dum fuit infra ætatem*, which lies for an infant, after he has attained his full age, to recover lands, which he has aliened in fee, in tail, or for life, during his infancy; and, after the death of the infant, the heir may have this writ. (*b*) But, though the infant cannot maintain this writ until his full age, yet he may enter during his minority. (*c*)

Of entry *dum fuit infra ætatem.*

When a man under duress of imprisonment aliened his lands, a writ of entry *dum fuit in prisonâ*, anciently lay to restore him to the possession of them. (*d*)

Of entry *dum fuit in prisonâ.*

The writ of entry *ad communem legem* lies where tenant for life, in dower, or by the curtesy, aliens in fee, in tail, or for the life of another, the land leased for life, &c. (*e*) in which case, after the death of the original tenant for life, &c. the reversioner in fee, in tail, or for life, may have this writ (*f*), which lies also where the grantee of the particular estate aliens in fee, &c., and for the grantee of the reversion. (*g*) As the wrongful alienation of these particular tenants is a forfeiture of their estates, and gives the reversioner an immediate right of entry, it was never requisite to resort to this action, unless that right of entry had been tolled by a descent (*h*), and, in that case, the reversioner must have waited until the death of the tenant for life, though afterwards a re-

Of entry *ad communem legem.*

(*a*) Litt. s. 405. F. N. B. 202 C.

(*b*) F. N. B. 192 G, I. Booth, 193. Litt. s. 406. Co. Litt. 247, b.

(*c*) F. N. B. 192 G, see the distinction in the form of the writ when brought by the alienor himself. F. N. B. 192 H.

(*d*) 2 Inst. 482.

(*e*) F. N. B. 207 G. Booth, 190.

(*f*) F. N. B. 207 G., but, according to Sir E. Coke, no one can maintain this writ but tenant in fee, or in tail. Co. Litt. 341, b.

(*g*) F. N. B. 208 F.

(*h*) 2 Inst. 309.

Of entry *ad communem legem.*

medy was given him during his lifetime by the writs of entry *in casu proviso*, and *in consimili casu*, according to the circumstances. (*a*) At present this writ is wholly obsolete.

The writ of entry *ad communem legem*, which, as the name imports, existed at common law, did not originally extend to cases where the tenants of the particular estates lost them by default or *reddition* in a real action; but, to remedy this, it is provided by the statute of Westminster 2, c. 3, that in such cases the reversioner shall recover by writ of entry, by which a writ of entry *ad communem legem* is to be understood. (*b*)

If tenant by the curtesy aliens in fee, &c. the heir of the reversioner may either have this writ after the death of tenant by the curtesy, in which case, by the statute of Gloucester, c. 3, the warranty of the husband without assets shall not bind him, or he may have an assise of *mortd'ancestor*. (*c*) And, when a tenant for life aliens in fee, and dies, the lessor himself may have this writ, or a writ of entry *ad terminum qui præteriit* at his election. (*d*)

This writ may be brought in the *per*, in the *per* and *cui*, or in the *post*, and the process is the same as in other writs of entry.

Of entry in *casu proviso.*

Before the statute of Gloucester, whenever a gift or feoffment was made in fee, or for life, by tenant in dower, although the reversioner might have entered for the forfeiture, and have avoided the estate, yet, if the alienee died seised, so that the right of entry was taken away, the reversioner had no remedy until after the death of tenant in dower, when, as already stated, he might have had a writ of entry *ad communem legem*. But, if the feoffment of the tenant in dower contained a warranty, as it usually did, and the reversioner was her heir, as was frequently the case, he was barred altogether by the warranty descending upon him. To remedy this grievance, it was enacted by the statute of Gloucester, 6 Ed. 1, c. 7, that if a woman should sell or give land in fee, or for term of life, which she held in dower, the heir or other person to whom the land ought to revert after the death of such woman should immediately recover the same by writ of entry. When this writ, therefore, is brought, living the te-

(*a*) See *post*.
(*b*) 2 Inst. 346.
(*c*) 2 Inst. 293.
(*d*) F. N. B. 208 E.

nant in dower, the reversioner cannot be bound by the warranty, because it has not descended. The writ framed upon this chapter of the statute of Gloucester, is the same as the writ of entry *ad communem legem*, with an additional clause referring to the statute in that case provided, whence it derives its name. (*a*) Of entry in *casu proviso*.

Since the statute 11 H. 7, c. 20, which makes alienations, releases, and confirmations with warranty by tenant in dower, either alone or with a second husband, (except for term of her own life), a forfeiture of her estate and void, this writ has become useless, and is superseded by the action of ejectment.

The process, &c. is the same as in other writs of entry.

This writ is grounded on the clause of the statute of Westminster 2, c. 24, which enacts, that whenever it shall happen in Chancery, that in one case a writ is found, and in like case, falling under like law, and requiring a like remedy, none is found, the clerks of the Chancery shall agree in making a writ. As the statute of Gloucester had provided a remedy when the tenant in *dower* aliened with warranty, and, as the same grievances which occasioned the writ of entry *in casu proviso* existed where tenant *by the curtesy* or for life aliened, the writ of entry *in consimili casu* was invented under the authority of the above clause, and received its appellation from these circumstances. (*b*) Of entry in *consimili casu*.

This writ lies for the reversioner in fee, in tail, or for life (*c*), or for a parson (*d*), during the life of the alienor, against the alienee, where tenant by the curtesy, for life, or *pur autre vie*, has aliened in fee, in tail, or for the life of another; and it lies for the grantee of the reversion against the alienee of the particular tenant. (*e*) It seems also, that this writ lies for him in remainder, as well as for the reversioner. (*f*) It has been said, that the issue in tail may maintain this writ, and, that where tenant in tail leases to another for the life of the lessee, the issue in tail may elect either to have this writ, or a *formedon*. The reason

(*a*) 2 Inst. 309, 10. F. N. B. 205 M. Booth, 197.

(*b*) 2 Inst. 403. Jehu Webb's Case, 8 Rep. 49, a. F. N. B. 206 F. Booth, 199.

(*c*) F. N. B. 206 F, G. 2 Inst. 403, but see Co. Litt. 341, b, *contra*, as to reversioner for life.

(*d*) Co. Litt. 341, b. F. N. B. 49 F.

(*e*) F. N. B. 207 A.

(*f*) F. N. B. 207 C, E.

Of entry in consimili casu.

is, that the lease, creating a discontinuance, vests a new reversion in fee in the tenant in tail, in right of which, the issue upon whom such reversion descends, is entitled to this writ of entry. (*a*) But, if the tenant in tail leases for his own life merely, which is no discontinuance, the issue in tail can only have a *formedon*, or may enter. (*b*) Though the alienation of the particular tenant be only for life, yet the writ supposes it to be in fee. (*c*) If the action be brought on the lease of the demandant himself, he has no need to make title in the writ, but, if it be brought on the lease of his ancestor, he must then trace his title. (*d*)

The process, &c. is the same as in other writs of entry.

Of cui in vita.

In the earlier stages of the English law, discontinuance by the husband of the wife's lands appears to have been a common grievance, for which a remedy was provided by the writ of *cui in vitâ* at common law (*e*), though it is indeed said, that anciently the wife was, in such case, put to her writ of right, because the husband was supposed to have the right of possession, which he might alien, leaving the wife to her mere right. (*f*) A writ of *cui in vitâ* lies where the husband, being seised in right of his wife, aliens in fee, in tail, or for life, the inheritance or life-estate of the wife. (*g*) If the husband lost the lands which the wife held in fee by default, the wife could not at common law have had this writ, but it is given her in that case by the statute of Westminster 2, c. 3. (*h*) If the wife was seised in fee-simple, and neglected to recover the land during her life, her heir is entitled to a writ of entry, called a *sur cui in vitâ*, after her death, and that of the husband, but, if she was tenant in tail, the heir can only have a *formedon* in the descender. (*i*)

This writ has become obsolete in consequence of the right of entry being preserved to the wife and her heirs by the statute 32 H. 8, c. 28 (*k*), for, in all cases in which the wife might have had a *cui in vita* at common law, she may now enter by force of

(*a*) F. N. B. 207 D.
(*b*) Ibid.
(*c*) F. N. B. 206 G.
(*d*) Ibid.
(*e*) Co. Litt. 326, a.
(*f*) Per Hedle, 5 Ed. 3, 58 B. Gilb. Ten. 108. Ferrer's Case, 6 Rep. 8, b. 2 Inst. 343, but this writ was known in Bracton's time, 321, b.
(*g*) F. N. B. 193 A.
(*h*) 2 Inst. 343.
(*i*) F. N. B. 198 A. Co. Litt. 30, a.
(*k*) See ante, p. 52.

this statute, and so when the issue could at common law have had a *sur cui in vita* or a *formedon*, they may now enter. (*a*) Of *cui in vita*.

The process and other incidents are the same as in other writs of entry. (*b*)

The same cause which has brought the writ of *cui in vita* into disuse, has rendered obsolete the writ of *cui ante divortium*, which lay for the wife, and the writ of *sur cui ante divortium*, which lay for the heir. These writs were formerly maintained, where the husband aliened in fee, &c. the estate of the wife, and the parties were afterwards divorced (*c*), but now, by the statute 32 H. 8, c. 28, the entry of the wife and her heirs is preserved. (*d*) Of *cui ante divortium*.

There was also another case of discontinuance at common law, for which an appropriate writ of entry was provided; where the head of a corporation aggregate, seised in right of the corporation, made a discontinuance, in which case the successor was entitled to a writ, called a writ of entry *sine assensu capituli*. (*e*) But now, in consequence of the statutes by which the monasteries are dissolved, and of the disabling statutes of 1 Eliz. c. 19, 13 Eliz. c. 10, and 1 Jac. 1, c. 3, this writ has become obsolete. (*f*) Of *sine assensu capituli*.

The writ of *ad terminum qui præteriit* lies where a man leases lands or tenements for life or years, and after the expiration of the term, by efflux of time or surrender, the lessee or a stranger enters upon the lands, and deforces the lessor or his heir. (*g*) Of *ad terminum qui præteriit*.

It seems doubtful, whether the statute of Westminster 2, c. 25, which enacts, that where tenant for years aliens in fee, the remedy shall be by assise of novel disseisin, and that both the feoffee and feoffor shall be taken for disseisors, does not take away the remedy by this writ of entry during the lifetime of the

(*a*) Greneley's Case, 8 Rep. 72, b. F. N. B. 193 A, margin.
(*b*) Booth, 187.
(*c*) F. N. B. 204 F. Booth, 188.
(*d*) Co. Litt. 326, a.
(*e*) F. N. B. 195 I.
(*f*) Co. Litt. 325, b. 2 Bl. Com. 320.
(*g*) F. N. B. 201 D, and note (*a*). Booth, 195.

Of *ad terminum qui præteriit.*

feoffor and feoffee. (*a*) It appears, that the grantee of the reversion may have this writ against the lessee, his heir, or assignee. (*b*) Like the other writs of entry, an *ad terminum qui præteriit* may be brought in the *per*, the *per* and *cui*, or the *post*. (*c*) This writ is now wholly superseded by the action of ejectment.

Of *causa matrimonii prælocuti.*

The writ of entry *causâ matrimonii prælocuti* lies where a woman gives lands to a man in fee-simple, or as it seems, for life, to the intent that he shall marry her, and afterwards he will not marry her within a convenient time, when required by the woman to do so (*d*), in which case she is entitled to this writ; and, though the lands be given generally, the woman may, in pleading, aver the same to be *causâ matrimonii prælocuti*. (*e*) Whether the man refuse or marry the woman, she is entitled to have the land again. (*f*) A man cannot recover land which he has given to a woman and her heirs *causâ matrimonii prælocuti*. (*g*) The process is summons and grand cape before appearance, and petit cape after appearance. (*h*)

Of *quare ejecit infra terminum.*

This writ lies where a man leases lands to another for years, and afterwards enters and makes a feoffment in fee, or a lease for life, of the same lands to a stranger, in which case the lessee may maintain this writ against the feoffee or lessee for life (*i*), or against the lessor. (*k*) So it lies where the son and heir of the lessor makes a feoffment, &c. and the feoffee ousts the lessee. (*l*) So if the lessor suffers a feigned recovery, the lessee may have a *quare ejecit infra terminum*, although the words of the writ are "by reason of which *sale*;" but, before the statute 21 Hen. 8, c. 15, the tenant for years could not have falsified the recovery had against the lessor. (*m*) If the lessor dies without heirs, and the lord by escheat enters, and puts out the lessee, it is said, that

(*a*) 2 Inst. 413. Reg. Br. 28, a. Booth, 195.
(*b*) F. N. B. 202 B.
(*c*) F. N. B. 201 E.
(*d*) F. N. B. 205 A, C. Booth, 197.
(*e*) Co. Litt. 226, a, 204, a.
(*f*) Co. Litt. 204, a.
(*g*) F. N. B. 205 F. Co. Litt. 204, a.
(*h*) F. N. B. 205 L.
(*i*) F. N. B. 197 S. Gilb. Eject. 115, (2d Edit.).
(*k*) F. N. B. 198 I.
(*l*) F. N. B. 198 C.
(*m*) F. N. B. 198 E. See *post*, title *Rec*

the latter may maintain this writ. (*a*) It seems that a *quare ejecit infra terminum* only lies where the ejector claims title under the lessor, and not against a mere stranger, for, in the latter case, the remedy was by *ejectione firmæ* (*b*), though it is said by Fitzherbert, that the sale supposed in the writ is not traversable, but only the ejectment. (*c*) The process in this writ is summons, attachment, and distress infinite. (*d*)

Of *quare ejecit infra terminum.*

(*a*) F. N. B. 198 F. Gilb. Eject. 123, (2d Edit.).

(*b*) Gilb. Ejectm. 123. (2d Edit.). Adams' Ejectm. 5, but see 1 Reeves' Hist. 341, *contra.*

(*c*) F. N. B. 198 K.

(*d*) F. N. B. 197 U. Gilb. Eject. 115. (2d Edit.).

Of the Writ of Quare Impedit.

Of *quare impedit.*

A *QUARE IMPEDIT* is properly a possessory writ which lies for the patron of an advowson, to restore him to the possession of his advowson and to his right of presentation. At common law it only lay where the patron was hindered from presenting during the vacancy of the church, plenarty being in all cases a good plea; but now by the statutes of Westminster 2, (13 Ed. 1,) and 7 Ann, c. 18, it lies in every case of an usurpation, though the clerk is admitted and instituted, provided it be brought within six months. And if the patron suffers the six months to elapse, he may still, on the next avoidance, bring his writ of *quare impedit.* By this writ the patron may not only recover possession of the advowson, but may remove the clerk who has been wrongfully presented, and have his own clerk admitted. The progress of the law relative to remedies for the recovery of advowsons has been already stated (*a*); and it has been shewn that a *quare impedit* is now the only action to which it can be necessary to resort, in order to redress an injury to a right of presentation. The writ of *quare impedit* is preferable to the assise of *darrein presentment,* for many reasons; wherever *darrein presentment* lies, *quare impedit* may be brought, but not *e converso.* (*b*)

What constitutes a disturbance.

The patron is said to be disturbed in presenting, either when the bishop has admitted and instituted a clerk upon the presentation of a pretended patron, or when, under any pretence, he refuses to admit the patron's clerk; but if the ordinary has filled the church by a wrongful collation merely, the true patron is not thereby disturbed, but he should actually present, and the ordinary must refuse to admit his clerk before any *quare impedit* can be brought, for the wrongful collation does not put the patron out of possession, but the bishop may institute his clerk, and then the two clerks may, in trespass, ejectment, or assise, try which has the better title. (*c*) Nor is the true patron disturbed by a stranger merely presenting a clerk to the bishop to be admitted

(*a*) *Ante*, p. 26.
(*b*) Wats. Cl. Law, 241, 242.
(*c*) Green's Case, 6 Rep. 29, b. 30, a. Boswel's Case, ibid. 50, a. Grendon v. Bp. of London, 2 Plowd. Com. 500. Wats. Clerg. Law, 121, 238.

to the church, unless the bishop has admitted him accordingly. (*a*) The refusal of the bishop to admit the plaintiff's clerk when presented is the disturbance, and therefore the patron, before he can bring his action for a disturbance, must cause his clerk to tender his presentation to the bishop and require admittance, and the bishop must refuse, or else, although the bishop be named in the writ, he may at the end of six months collate by lapse. (*b*) But if the church be full upon the presentation of a stranger, that is an actual disturbance, and the plaintiff may bring his action without previously presenting his clerk. (*c*) The wrongful presentation, institution, and induction of a clerk to a church donative, make only a disturbance at election. (*d*)

Of *quare impedit.*

The plaintiff in *quare impedit* must have an immediate right of presentation and not merely in reversion or remainder, for it is a possessory action. If one person has the right of nomination, and another the right of presentation, and either of them impedes the other, a *quare impedit* lies (*e*); or if a stranger presents, the two may join in a *quare impedit* (*f*); and if the writ be brought by him who has the right of nomination, it runs "that he permit him to present," and not "to nominate," and the special matter is shewn in the count. (*g*) A grantee of the next avoidance may maintain *quare impedit* against the patron who granted it. (*h*) And if there is a grant of the next avoidance to two, and one of them releases to the other, before the church becomes void, the latter may bring a *quare impedit* alone. (*i*) The king may have a *quare impedit* (*k*), so may a parson, patron of a vicarage. (*l*)

By whom it lies.

An heir cannot have this action for a disturbance in his ancestor's lifetime (*m*); unless the church be donative, when the right of presentation upon a vacancy in the ancestor's lifetime descends to the heir. (*n*) An executor or administrator may have a *quare*

Heir and executor.

(*a*) Watts. Cl. Law, 238.

(*b*) Brickhead v. Abp. of York, Hob. 200. 1 Brownl. 164. S. C. Jenk. Cent. 11. Watts. Cl. Law. 238. See Com. Dig. Eglise, (H. 13).

(*c*) Watts. Cl. Law, 238.

(*d*) Watts. Cl. Law, 306. 2 Wils. 151.

(*e*) Moor, 49, 894. Dyer, 48, a. Rast. Ent. 506, b. Rex v. Marquis of Stafford, 3 T. R. 646. F. N. B. 33 B. and see Watts. Clerg. Law, 85.

(*f*) Dyer, 48, a. in margin.

(*g*) F. N. B. 33 B. and Hale's note, (*d*).

(*h*) Fitz. Ab. *Quæ. imp.* 95.

(*i*) Lewes v. Bennet, Moor, 467. Cro. Eliz. 600.

(*k*) F. N. B. 36 E.

(*l*) F. N. B. 49 L.

(*m*) Br. Ab. *Quæ. imp.* 7. F. N. B. 33 P.

(*n*) Repington v. Gov. of Tamworth School, 2 Wils. 150.

Of *quare impedit.*

impedit and recover damages for a disturbance either in his own time or in the time of his testator or intestate. (*a*)

By whom. *Coparceners.*

Coparceners should, it seems, join in a *quare impedit* where there has been no composition to present in turns, and no disagreement (*b*); but where there has been such composition or disagreement, the coparcener, whose turn it is, alone, or all the coparceners together, may sue, at their election. (*c*) The presentation by one coparcener does not put the others out of possession. (*d*) Tenants in common and jointenants must join in a *quare impedit* (*e*); if coparceners, jointenants, or tenants in common of an advowson, make partition to present in turns, each shall be seised of a separate estate to present accordingly. (*f*)

Husband and wife.

Where a husband is seised of an advowson in right of his wife, and the church becomes void, the husband alone in right of his wife may maintain a *quare impedit* (*g*); or it may be brought by both. (*h*) If the church become void during the coverture, and the husband and wife be disturbed in presenting to it, and the husband die, the wife may have a *quare impedit* after his death. (*i*)

And so the husband shall have the presentation if he survive, but not if the church became vacant before the coverture. (*k*)

Since the statute 7 Ann, c. 18, no usurper or disturber can devest the right of presentation out of the true patron, or acquire the inheritance of the advowson by wrong. At the present day, therefore, every person who has a right to present may, notwithstanding any former usurpation, present a clerk on the church becoming vacant, or, if disturbed in so doing, may have a *quare impedit*, and it is consequently immaterial to inquire what persons were enabled by the statute of Westminster 2, to take advantage of this remedy. (*l*)

(*a*) Smallwood v. Bp. of Coventry, Cro. Eliz. 207. Sav. 118. S. C.

(*b*) Wats. Cl. Law, 254, *ante*, p. 7.

(*c*) Barker v. Bp. of London, 1 H. Bl. 417. *ante*, p. 7, and stat. 7 Ann, c. 18.

(*d*) Dyer, 259. 2 Inst. 365. Watk. on Desc. 53, note.

(*e*) *Br. Ab. Joind. in Act.* 103. Co. Litt. 197, b. Wats. Cler. Law, 254, *ante*, p. 7.

(*f*) St. 7 Ann, c. 18.

(*g*) Br. Ab. *Baron and Feme*, 28, 41. Wats. Cl. Law, 255. March, 47, *contra.*

(*h*) Br. Ab. *Bar. and Feme*, 41. Hall's Case, 7 Rep. 26.

(*i*) Fitz. Ab. *Quare imp.* 57, 71. Co. Litt. 351, a.

(*k*) Co. Litt, 351, a, b. 120, a.

(*l*) For the law as it stood before the statute of Ann, see 1 Mal. *Quare imp.* 137. Booth, 121, 224. 2 Inst. 356. Com. Dig. *Quare imp.* (D.) Beswell's Case, 6 Rep. 48, b. Stanhope v. Bp. of Linc. Hob. 237, and *ante*, p. 26.

Where a person has wrongfully presented a clerk, who has been admitted and instituted by the bishop, the writ of *quare impedit* may be, and usually is, brought against the bishop, the wrongful patron, and the incumbent. The bishop is joined in order to prevent his collating by lapse in case the church should become vacant; the wrongful patron is made a defendant because his estate is to be devested out of him by the judgment, and the wrongful incumbent, in order that he may be removed if the plaintiff succeeds in the action.

Of quare impedit.

Against whom.

If the hindrance for which the *quare impedit* is brought, is the act of the bishop alone, as if, the church being void, he refuses to admit and institute the plaintiff's clerk, under pretence of incapacity or the like, the writ must be brought against him only (*a*); but if he has admitted and instituted the clerk of an usurper, the usurper and his clerk are also made defendants. If the church be full, it is said by Lord Hobart to be useless to name the ordinary, as there is no danger of a lapse (*b*), but the usual course now is to join him in the writ. (*c*) Unless the bishop has been guilty of a disturbance, it has been already stated, that it seems he may collate, after six months expired (*d*); but where the church has become litigious (*e*), in consequence of two persons mutually presenting their clerks to the ordinary, it appears that the bishop, by refusing the clerk of the true patron, debars himself of his right of collating by lapse, if he is made a party to the *quare impedit*. (*f*)

Ordinary.

The patron ought to be made a defendant, whenever his inheritance, estate, or interest, is to be devested, and if he is not named, it may be pleaded in abatement (*g*); but it is not error. (*h*) But when the inheritance, estate, or interest, of the patron is not to be devested, then if another disturber is named, it is not necessary to name the patron (*i*), as where the next presentation only is to be recovered and not the advowson (*k*), or where the

Patron.

(*a*) 3 Bl. Com. 247.

(*b*) Elvis v. Abp. of York, Hob. 320.

(*c*) 3 Bl. Com. 247.

(*d*) *Ante*, p. 101.

(*e*) The bishop in this case may secure himself from being a disturber, by awarding a *jure patronatus*. For this proceeding see Wats. Cl. Law, 113, 228, 236. 3 Bl. Com. 246.

(*f*) Brickhead v. Abp. of York, Hob. 201; but see this doubted in Wats. Cl. Law, 262.

(*g*) Hall's Case, 7 Rep. 25, b. Wats. Cl. Law, 256. But see 2 Leon. 58, S. C.

(*h*) Savil v. Thornton, Cro. Jac. 651. Palm. 311. W. Jones, 12, S. C. Bac. Ab. Error, (K).

(*i*) Hall's Case, 7 Rep. 26, b. Wats. Cl. Law, 256.

(*k*) Savile, Case 184.

Of *quare impedit.*

king brings a *quare impedit*, upon an avoidance by simony in the incumbent. (*a*) The advice given by Lord Hobart is, not to

Against whom.

name more disturbers than are likely to have reasonable titles, for every disturber will make a several title, and traverse, or confess and avoid the plaintiff's title, whether they themselves have title or not, and therefore it is better not to name them. (*b*) If the king presents, and his clerk is admitted and instituted, the *quare impedit* must be brought only against the bishop and incumbent or one of them. (*c*)

Clerk.

If the action is brought against the ordinary and the disturber only, omitting the incumbent, who was instituted before the action commenced, the patron may recover his right of patronage, but not his present turn, for he cannot have judgment to remove the clerk, unless he is made a party to the writ (*d*); but if the clerk of the party, against whom judgment is given, is admitted and instituted pending the suit, then, as he could not have been made a defendant in the action, he may be removed though not named. (*e*)

For what.

When the action is brought for a disturbance to a parsonage or rectory, the form of the writ is "command, &c. that they permit him to present, &c. to *the church*, &c." for by the word church a parsonage or rectory is properly understood (*f*); if for disturbance to a vicarage then "to the vicarage (*g*)"; if to a prebend, then "to the prebend;" if to a chapel, then "to the chapel;" and thus the advowson ought always to be named, as it is. (*h*) A *quare impedit* lies of a church donative, the form of the writ being, "that they permit him to present to the church," and the particular title is stated in the count, and so it lies of a prebend or chapel donative. (*i*) It should be observed that a disturbance of a donative is only a disturbance at election, and

(*a*) R. v. Abp. of York, 3 Lev. 16, but see R. v. Bp. of Litchfield, Noy, 151. Wats. Cl. Law, 256.

(*b*) Elvis v. Abp. of York, Hob. 320.

(*c*) Keilw. 53, a. Hall's Case, 7 Rep. 26, b.

(*d*) Per Doddridge, in Harris v. Austin, 3 Bulstr. 38. 1 Brownl. 159. 3 Bl. Com. 248.

(*e*) F. N. B. 35 C.

(*f*) F. N. B. 32 H. Wats. Cl. Law, 250.

(*g*) F. N. B. 32 H. but if a vicarage be called a church, it is not error, R. v. Bp. of Norwich, 1 Rol. Rep. 237. Wats. Cl. Law, 251.

(*h*) F. N. B. 32 H. 2 Inst. 363.

(*i*) Co. Litt. 344, a. Br. Ab. *Quare imp.* 156. F. N. B. 35 C. 2 Burn's Ecc. Law, title "Donative," 202. R. v. Bp. of Chester, 1 T. R. 396, and see R. v. Marquis of Stafford, 3 T. R. 649. But see as to an appropriation, Greadon's Case, Plow. Com. 500, b. Wats. Cl. Law, 247.

Of *quare impedit.*

For what.

that a church donative cannot be so filled by presentation, institution, and induction, as actually to put the true patron out of possession, and prevent him from preferring his clerk. He may therefore either put in his own clerk notwithstanding the church be full, and the two clerks may then try their right in trespass or ejectment, or he may, if he please, admit himself out of possession, and bring his *quare impedit.* (*a*)

A *quare impedit* will lie for an hospital, or for a church and a hospital, being one and the same thing. (*b*) So it lies for an archdeaconry (*c*); but it does not lie for a chancellorship or a commissaryship. (*d*) A *quare impedit,* "to present to the *moiety* of the church," &c., only lies where there are two several patrons and two several incumbents of the church, so that each patron has a distinct and separate advowson of one half of the church, and his incumbent a distinct and separate half of the tithes and other ecclesiastical profits in the same town, in which case the advowson and the church are severed both in right and possession. But if there be only one incumbent, then, although the advowson be severed and divided, yet no *quare impedit* will lie "to present to the *moiety* of the church," &c.; but in such case the form of the writ must be, "to present to the *church*" generally, and the plaintiff's title must be stated truly in the declaration. (*e*) So in a *quare impedit* by the king for a prerogative turn, the writ is general, "*quæ ad nostram donationem spectat,*" and the count special, "*quæ ad nostram donationem spectat jure prerogativæ.*" (*f*) The alteration of a church in name or otherwise will not prevent the patron from having his *quare impedit* by the new name, if that writ could have been brought before the alteration (*g*); and so if two churches be united, he who is patron by the union may have a *quare impedit.* (*h*)

The writ of *quare impedit* must be brought in the Common

(*a*) Wats. Cl. Law, 306. Co. Litt. 344, a. *ante,* p. 101.

(*b*) F. N. B. 33 G. Mayor of Bedford v. Bp. of Lincoln, Willes, 611. Williams v. Bp. of Lincoln, Cro. Eliz. 790. Rast. Ent. 506, b. Wats. Cl. Law, 240.

(*c*) Smallwood v. Bp. of Coventry, Cro. Eliz. 207. 1 Leon. 205, S. C. Wats. Cl. Law, 240.

(*d*) Wats. Cl. Law, 240.

(*e*) Smith's Case, 10 Rep. 135, b. Windsor's Case, 5 Rep. 102, b. Windham v. Bp. of Norwich, 1 Brownl. 165. Wats. Cl. Law, 252.

(*f*) R. v. Bp. of London, 1 Salk. 559. 3 Lev. 377, 382, S. C.

(*g*) Wats. Cl. Law, 253.

(*h*) Ibid. Coppledick v. Tansey, Hutt. 31. See more as to the name of the Church, Ayray's Case, 11 Rep. 22, a.

Of *quare impedit.*

Pleas, unless the king is plaintiff, who may choose his own court. (*a*) The venue is local, and must be laid in the county where the church lies, though it is otherwise in the king's case, and a *quare impedit* for a prebend must be brought in the county where the cathedral church lies. (*b*) There must be fifteen days between the teste and return of the writ, and the teste it is said ought to be the day of the issuing. (*c*)

Process, &c.

The process in *quare impedit* is summons, attachment, and, at common law, distress infinite; but by the statute of Marlbridge, c. 12, if the defendant makes default at the return of the *distringas*, the plaintiff may have judgment, and a writ to the bishop. Either the plaintiff or defendant may be essoigned, but if the ordinary essoigns himself it makes him a disturber. Neither voucher nor aid-prayer lies. Damages are recoverable, but no costs. Judgment may be given at nisi prius, and a writ of *admittendum clericum* awarded there. (*d*)

Ne admittas and *Quare incumbravit.*

As soon as the *quare impedit* is sued out, the plaintiff, or, as it seems, the defendant, if he suspect that the bishop will admit a clerk *pendente lite*, may have a *ne admittas*, which is a prohibitory writ, forbidding the bishop to admit any clerk whatsoever, before the contention determined. (*e*) This writ ought to be brought within the six months, for after that time the right of collation has vested in the bishop (*f*), if he has not been guilty of a disturbance. (*g*) If the bishop admits a clerk notwithstanding this writ, and the plaintiff recovers, the latter may then sue out a *quare incumbravit* against the bishop, and shall recover on it his damages and the presentation, and remove the clerk who came in *pendente lite*. (*h*)

(*a*) Reg. Br. 29, b. F. N. B. 33 E. Magdalen College Case, 11 Rep. 68, b.

(*b*) Bulwer's Case, 7 Rep. 3, a. Merrick's Case, Dyer, 194, a. As to *Quare Imp.* in Wales, see Vaughan, 410.

(*c*) Reg. Br. 30, a. Br. Ab. *Quare imp.* 151. Wats. Cl. Law, 254.

(*d*) See *post* under the proper heads.

(*e*) F. N. B. 37 F. H. 3 Bl. Com. 248. Wats. Cl. Law, 239.

(*f*) F. N. B. 37 E.

(*g*) See *ante*, p. 103.

(*h*) F. N. B. 48 D. &c. Wats. Cl. Law, 240. Lancaster v. Lowe, Cro. Jac. 93.

Of the Writ of Waste.

Of waste.

WASTE is a spoil or destruction in houses, gardens, trees, lands, or other corporeal hereditaments, to the disherison of him who has the reversion, or remainder in fee-simple or fee-tail. (*a*) And it is either voluntary, which is an act of commission, as by pulling down a house, or it is permissive, or a matter of omission only, as by suffering it to fall for want of necessary reparations. (*b*)

By whom.

The action of waste may be brought by any person who has the immediate reversion, or remainder in fee, or in tail, whether by descent, purchase, or escheat (*c*); but if there be any intermediate estate of freehold, no action of waste lies for the ultimate remainderman or reversioner (*d*); but, though there be a mesne estate for life, yet as soon as that estate is determined by death, or surrender, the reversioner in fee may maintain a writ of waste for waste committed during the continuance of the intervening estate, for it was to his disherison, although during the life estate he had no remedy (*e*); and if the remainder for life is contingent, before the contingency happens, the reversioner may have waste (*f*); and he may have waste, although the mesne remainder for life which is determined, was without impeachment of waste. (*g*) Where the reversioner grants the reversion for years, he cannot bring waste; but it is otherwise where he only makes a lease in reversion (*h*), and a remainder for years will not prevent the ultimate reversioner or remainderman in tail or in fee from bringing waste. (*i*)

(*a*) Co. Litt. 53, a. 2 Bl. Com. 281.

(*b*) 2 Inst. 145. 2 Bl. Com. 281.

(*c*) 2 Rol. Ab. 825. Com. Dig. Waste, (C. 2). Co. Litt. 53, b. 2 Saund. 252, note (7).

(*d*) Co. Litt. 54, a. "In F. N. B. (56, C. 59, H.), it must be understood," says Sir E. Coke, "that the mean remainderman is dead, or has surrendered." Where the tenant is also the mesne remainderman, see Co. Litt. 299, b.

(*e*) Paget's Case, 5 Rep. 76, b. Bray v. Tracy, Cro. Jac. 688. W. Jones, 51, S. C. 2 Rol. Ab. 829, l. 20.

(*f*) Udal v. Udal, Aleyn, 82.

(*g*) Bray v. Tracy, Cro. Jac. 688.

(*h*) Co. Litt. 54, a. 2 Rol. Ab. 829, l. 30, 35. 2 Prest. Conv. 145, 6.

(*i*) F. N. B. 59 H. 2 Inst. 301.

Of waste.

By whom.

In some special cases an action of waste will lie, although the lessor had nothing in the reversion at the time of the waste done; as where lessee for life makes a feoffment in fee upon condition, and waste is done, and afterwards the lessee re-enters for the condition broken, in this case the lessor shall have an action of waste. So if a bishop makes a lease for life or years, and dies, and the lessee, the see being void, does waste, the successor shall have an action of waste. And so if lessee for life is disseised, and waste is done, and the lessee re-enters, an action of waste may be maintained against him, and yet in none of these cases the plaintiff had any thing in the reversion at the time of the waste committed. (*a*)

There are some cases, in which, on account of the doctrine of tenure, a person who has not the inheritance, may join with another person who has, in bringing an action of waste. Thus if tenant for life and the reversioner join in making a lease, the lessee will hold of the tenant for life, and if he commit waste, the action must be brought by the tenant for life and reversioner. (*b*) And so where a reversion is granted to two and the heirs of one of them, and waste is committed by the tenant, the action shall be brought by both (*c*); and so if there be two jointenants for life, the reversion in fee to one of them, and they make a lease and waste is done. (*d*)

Where there are jointenants for life, remainder to one of them in fee, and the tenant for life commits waste, he who has the fee has no remedy against him who holds for life, by the statute of Gloucester, although the heir has, after his ancestor's death; but it seems that he who has the fee may maintain a writ of waste against the tenant for life by the statute of Westminster 2, 13 Ed. 1, c. 22 (*e*), which enacts, that where two or more hold wood, turf-land, or fishing, or other such thing in common, (and by the equity of the statute, in jointenancy,) and some of them do waste against the minds of the other, an action may lie by a writ of waste. (*f*) Jointenants and tenants in common for life are

(*a*) Co. Litt. 356, a.

(*b*) Co. Litt. 42, a. Thel. Dig. l. 2, c. 2. s. 4. Treport's Case, 6 Rep. 15, a. Bredon's Case, 1 Rep. 76, a. 3 Prest. Conv. 33.

(*c*) F. N. B. 59 F. Co. Litt. 42, a. 53, b.

(*d*) 2 Rol. Ab. 825, l. 35.

(*e*) Co. Litt. 53, b. 200, b. 247, b. 2. Rol. Ab. 825, l. 40.

(*f*) 2 Inst. 403. F. N. B. 59 D.

Of waste..

By whom.

within the statute, but it does not apply to coparceners before partition. (*a*)

If a reversion is vested in two coparceners, and waste is committed, and one of the coparceners dies, and her interest in the reversion descends to her daughter, an action may be maintained by the aunt and the niece. (*b*) But this has been doubted, because the daughter can only have judgment to recover the place wasted, and not the damages, for which the aunt must have a sole judgment. (*c*) A surviving coparcener and the tenant by the curtesy of the other coparcener's share, may join in an action of waste. (*d*)

An action of waste does not lie for the heir for waste done in his ancestor's time (*e*); nor for the successor of a sole corporation for waste in the time of his predecessor (*f*); nor for a younger son, for waste done in the lifetime of his elder brother, who dies before action brought (*g*), nor for a grantee of the reversion, or lord by escheat, for waste done before the grant or escheat (*h*); and if the estate in the reversion is changed, as if after the waste, the reversioner grants the reversion, and takes it back again, the action of waste is gone. (*i*) If tenant in tail grants an estate for his life, and afterwards releases all his right to the lessee and his heirs, he cannot maintain an action of waste (*k*); nor does waste lie by tenant in tail after possibility, even for waste committed while he had the inheritance in him. (*l*)

Against whom.

The action of waste, at common law, lay only against guardian in chivalry, tenant in dower, and tenant by the curtesy, and not against tenant for life or years. (*m*) The reason was that the guardian, tenant in dower, and by the curtesy, came in by act of law, and not by the act of the party, as other tenants, and, therefore,

(*a*) 2 Inst. 403. Co. Litt. 200, b.

(*b*) 2 Inst. 305. F. N. B. 60 R. Co. Litt. 53, b. 2 Rol. Ab. 825, l. 50.

(*c*) Eastcourt v. Weekes, 1 Lutw. 803. 1 Salk. 187, S. C. Hargrave's note, Co. Litt. 63, a. (1).

(*d*) Co. Litt. 53, b. 2 Rol. Ab. 825, l. 48.

(*e*) 2 Inst. 305. Com. Dig. Waste, (C. 3). Co. Litt. 53, b.

(*f*) Co. Litt. 53, b. 2 Rol. Ab. 824, l. 43, 49. But it lies for a bishop, for waste done during the vacancy of the see. Co. Litt. 356, a. *Ante*, p. 108.

(*g*) 2 Rol. Ab. 825, l. 10.

(*h*) Com. Dig. Waste, (C. 3). 2 Rol. Ab. 825, l. 6.

(*i*) Co. Litt. 53, b.

(*k*) Co. Litt. 351, a. Cholmley's Case, 2 Rep. 52, a. See *ante*, p. 48.

(*l*) 2 Rol. Ab. 825, l. 31. Co. Litt. 53, b.

(*m*) 2 Inst. 299, but in some books it is said, that a *prohibition* of waste only lay at common law, 5 H. 5. 13, a. Pilfold's Case, 10 Rep. 116, b.

Of waste.

Against whom.

the reversioner had no opportunity of providing against the doing of waste. (*a*) In consequence of the statute of Gloucester having given the writ of waste against tenant by the curtesy, it has been supposed, that he was not punishable at common law (*b*); but it seems, that the statute only named him to clear away some doubts which had arisen as to his liability, from the circumstance of the word *tenet* or *tenuit*, being always inserted in the writ of waste; whereas, tenant by the curtesy does not *hold* of the *heir* (the plaintiff), but of the lord paramount. (*c*) By the statute of Gloucester, 6 Ed. 1, c. 5, an action of waste is given against him who holds by the law of England, or otherwise for term of life, or for term of years, or a woman in dower.

With regard to tenants in dower, and by the curtesy, there is still this distinction between them and tenants for life or years, that where the former grant over the estate, and the grantee commits waste, an action of waste lies by the original lessor or his heir, against the tenant in dower, or by the curtesy, and not against the grantee. (*d*) The reason is, that before the statute of Gloucester, when tenant by the curtesy, &c. assigned over his estate, the assignee was merely tenant *pur autre vie*, against whom no action of waste lay, and, therefore, that the reversioner by the act of the tenant by the curtesy, might not be deprived of the remedy which the law gave him, he was allowed to bring his action against the tenant by the curtesy, notwithstanding the assignment, and, after the statute of Gloucester, this continued to be law. (*e*) If the tenant in dower, or by the curtesy, assigns the particular estate, and the heir also grants the reversion, the grantee of the reversion may bring waste against the assignee of the particular estate. (*f*)

Tenant for life, or *pur autre vie*, is within the statute of

(*a*) 2 Inst. 299, but there is great contrariety of opinion as to the persons who were punishable for waste at common law. See Bracton, 315, 316, 317. 2 Reeves' Hist. 148, (note).

(*b*) Br. Ab. Waste, 88.

(*c*) 2 Inst. 301, but see Co. Litt. 54, a, and see 2 Inst. 145, as to Prohibition of Waste against tenant by the curtesy. *Prohibition of Waste* was given against tenants for lives and years by st. Marlbridge, c. 24. By the statute of West. 2, c. 14, Prohibition of Waste is taken away. Com. Dig. Waste, (C. 1).

(*d*) 2 Inst. 300. F. N. B. 56 F. Walker's Case, 3 Rep. 23 Br. Ab. Waste, 66.

(*e*) 2 Inst. 300.

(*f*) F. N. B. 56 E. F. Walker's Case, 3 Rep. 23, b. Co. Litt. 54, a. Com. Dig. Waste, (C. 4).

Of waste.

Against whom.

Gloucester. (*a*) So an occupant (*b*) and a devisee. (*c*) If a stranger does waste, an action will lie against tenant for life or years, who must take his remedy over, and so if a stranger disseises the tenant for life, and does waste (*d*), and an infant or feme covert is answerable for waste committed by a stranger. (*e*)

If one of two jointenants for life or years does waste, it is the waste of both, but damages shall only be recovered against him who actually did the waste. (*f*)

If a feme covert lessee for life, takes baron, who commits waste, an action lies against both (*g*); and, if after the waste done, the baron dies, the action lies against the feme. (*h*) If a lease be made to baron and feme for life, and the baron commits waste and dies, the feme is punishable if she agrees to the estate, but, if she disagrees, she shall not be charged. (*i*) But, if a feme, tenant for life, takes husband, and he does waste, and the wife dies, no action of waste lies against the husband, for he was seised *in jure uxoris*, and his wife was tenant of the freehold, and it cannot, therefore, be alleged in the writ that he *held* of the *demise* of any one, but otherwise, if the wife was possessed of a term, for the law gives that term to the husband. (*k*)

It is a general rule, that the action of waste shall be brought against the person who was the tenant of the land at the time of the waste done, except in the case of tenant in dower, and by the curtesy (*l*), and, therefore, if tenant for life or years commits waste, and assigns over the premises, an action of waste in the *tenet* lies against the original lessee, and the premises wasted may be recovered in it (*m*); but, if the waste be done after the assignment, the action should be brought against the assignee (*n*), and, if an estate for life or years is forfeited to the king for treason, waste will lie against the king's grantee, though he is *in* in the

(*a*) 2 Inst. 301, and waste lies in the *tenuit* after the death of *cestui que vie*. 2 Rol. Ab. 830, l. 14.

(*b*) Dean and Ch. of Worcester's Case, 6 Rep. 57, b. Co. Litt. 54, a.

(*c*) 2 Rol. Ab. 826, l. 35, but the reversioner may maintain case against the stranger. Attersoll v. Stephens, 1 Taunt. 194.

(*d*) Co. Litt. 54, a. Br. Ab. Waste, 138. 1 Leon. 264.

(*e*) 2 Inst. 303. 1 Taunt. 202.

(*f*) 2 Inst. 302-3.

(*g*) 2 Rol. Ab. 827, l. 5.

(*h*) 2 Rol. Ab. 827, l. 7.

(*i*) Co. Litt. 54, a. 2 Rol. Ab. 827, l. 10.

(*k*) Co. Litt. 54, a. Clifton's Case, 5 Rep. 75, b. 1 Lutw. 674; see further, as to waste against husband and wife, Vin. Ab. Waste, (R).

(*l*) Co. Litt. 54, a, *ante*, p. 110.

(*m*) 2 Inst. 302. F. N. B. 56 A. Br. Ab. Waste, 22.

(*n*) F. N. B. 60 L. Sanders v. Norwood, Cro. Eliz. 683.

Of waste.

Against whom.

post (*a*), and so against a lord who enters upon his villein. (*b*) If tenant for life grants his estate upon condition, and the grantee does waste, and the grantor re-enters for the condition broken, the action, in which the place wasted may be recovered, must be brought against the grantee. (*c*) If tenant for life or years assigns over his estate, but continues to take the profits, an action of waste lies against him by the statute 11 H. 6, c. 5, even though there may have been several mesne assignments. (*d*) Waste does not lie against tenant in tail, after possibility of issue extinct, on account of the inheritance, which was once in him, but this exemption does not extend to his assignee. (*e*) If tenant for life or years assigns, excepting the timber trees, and the timber trees are afterwards cut down, an action of waste is maintainable against the assignee, for, with regard to the lessor, the trees are not severed from the land. (*f*)

An action of waste lies against tenant for half a year, or for a less time. (*g*) And it lies in the *tenuit* against a lessee for years after the lease expired. (*h*) If the tenant for life makes an underlease for years, and the reversioner confirms it, and the tenant for life dies, an action of waste lies against the lessee for years. (*i*) If the lessee for life makes an underlease for years, and afterwards enters upon the land, and commits waste, and the lessor recovers in an action of waste, he shall avoid the lease made before the waste done. (*k*) Executors or administrators of tenant for years, though they hold *in autre droit* only, shall be punished for waste done in their own time, but not in the time of their testator or intestate (*l*); and, if the testator devises the term, and his executors do waste, and afterwards assent to the devise, an action of waste is maintainable against them in the *tenuit* (*m*), and an executor *de son tort* may be sued. (*n*)

Waste, as it has been said, does not lie against tenant in tail

(*a*) 2 Rol. Ab. 826, l. 20.

(*b*) Co. Litt. 54, a. Com. Dig. Waste, (C. 3).

(*c*) Co. Litt. 54, a. 2 Inst. 302.

(*d*) 2 Inst. 302. F. N. B. 59 C.

(*e*) 2 Inst. 302. 2 Rol. Ab. 828, l. 44.

(*f*) 2 Inst. 302. Saunders's Case, 5 Rep. 12, b.

(*g*) 2 Inst. 302. Hill v. Grange, 1 Plow. Com. 178. Co. Litt. 54, b.

(*h*) 2 Rol. Ab. 830, l. 10.

(*i*) 2 Inst. 302, *contra* if tenant for life had been without impeachment of waste. Bray v. Tracy, W. Jones, 51.

(*k*) Co. Litt. 233, b.

(*l*) 2 Inst. 302. Com. Dig. Waste, (C. 5).

(*m*) Saunders's Case, 5 Rep. 12, b.

(*n*) Mayor of Norwich v. Johnson, 3 Lev. 35.

Of waste.

What is waste.

after possibility. (*a*) Tenants by statute merchant, statute staple, and elegit, are not within the statute of Gloucester, and are dispunishable for waste, for, though they have chattel interests, yet they are not tenants for years within the statute (*b*); nor is a tenant at will punishable for waste in an action of waste, not being within the statute of Gloucester. (*c*) If he commits voluntary waste, trespass will lie, but, if it only be permissive waste, the lessor has no remedy. (*d*) The authorities differ as to waste lying against guardian in socage. (*e*)

In houses.

1. In houses. Waste may be done in houses by pulling them down, or prostrating them, or by suffering them to be uncovered, whereby the rafters or other timber of the house are rotted (*f*), though the timber be not thereby thrown down. (*g*) But, if the house was uncovered when the tenant came in, it is no waste to suffer it to fall down. (*h*) If the house be ruinous at the time of the tenant's coming in, yet, if he pull it down, it will be waste, unless he re-build it; but, if a house built *de novo* was never covered in, it is no waste to abate it. (*i*) If the walls are suffered to decay for want of plaistering, whereby the timber is rotted, it is waste. (*k*) If the house is uncovered by a tempest, and the timbers are left standing, and afterwards, for want of roofing, decay, this is waste, but, if the whole house is thrown down by the wind, it is not waste not to build a new house. (*l*) It is waste if a lessee pulls down the house, and rebuilds it less than it was before (*m*), or larger, to the prejudice of the lessor, for it is more chargeable to repair. (*n*) It seems, that building a new house, where there was none before, cannot be considered waste, but it is waste to suffer it to decay (*o*), and it

(*a*) 2 Inst. 302. Williams v. Williams, 12 East, 209.

(*b*) Dean and Chapter of Worcester's Case, 6 Rep. 37, b. 2 Inst. 302. 2 Rol. Ab. 826, l. 22. Co. Litt. 54, a. 57, a. Hargrave's Note (1), but see F. N. B. 58, H. Reg. Br. 57. a.

(*c*) 2 Rol. Ab. 828, l. 40. Co. Litt. 57, a Hargrave's Note, (1).

(*d*) Litt. s. 71. Co. Litt. 57, a. Countess of Shrewsbury's Case, 5 Rep. 13, b.

(*e*) F. N. B. 59 E. 2 Inst. 135. Co. Litt. 54, a.

(*f*) Co. Litt. 53, a. Com. Dig. Waste, (D. 2). Vin. Ab. Waste, (D). Bac. Ab. Waste, (C. 5).

(*g*) 2 Rol. Ab. 815, l. 31.

(*h*) Co. Litt. 53, a. Dyer, 36, a. 2 Rol. Ab. 818, l. 2, *contra*.

(*i*) Co. Litt. 53, a. Hale's Note, Co. Litt. 53, a. (4).

(*k*) 2 Rol. Ab. 816, l. 50.

(*l*) 2 Rol. Ab. 818, l. 20, 22. Co. Litt. 53, a. Moor, 62.

(*m*) 2 Rol. Ab. 815, l 33.

(*n*) 2 Rol. Ab. 815, l. 35.

(*o*) 2 Rol. Ab. 815, l. 45. Keilw. 38, b. Lord Darcy v. Askwith, Hob. 234. Bac. Ab. Waste, (C. 4,) Gilb. Ten. 235, but see Co. Litt. 53, a. Com. Dig. Waste, (D 2). Anon. 11 Mod. 7, *contra*.

Of waste.

What is waste.

is waste to alter the house to the lessor's prejudice, as by converting a hall into a stable. (*a*) So if the lessee changes a corn-mill to a fulling mill, or to a horse-mill, though it be for the lessor's advantage. (*b*) So, if he turns two rooms into one, by throwing down the wall between them. (*c*) Though there be no timber on the ground for repairing the houses, the tenant must keep them from wasting at his peril. (*d*) If waste be done *sparsim* in several parts of a house, the whole house shall be forfeited. (*e*)

Fixtures.

Personal chattels annexed to the freehold, either by the reversioner or the tenant, are not removable, and to carry them away, or break them down, is waste; thus, it is waste to break glass windows, though glazed by the tenant himself. (*f*) The general rule on this subject has, in progress of time, been much relaxed, and many exceptions have been grafted upon it. (*g*) Whether an article be a fixture or not, is a question partly of fact, and partly of law. (*h*)

At an early period an attempt was made to restrain the generality of the rule in favour of trade (*i*), and, in process of time, the exception in favour of the right in the tenant to remove utensils set up in relation to trade, became fully established. (*k*) In Poole's case (*l*), Lord Holt held, that a soap-boiler might well remove the vats which he had set up in relation to trade, and this by the common law, without any special custom, and the same doctrine has been subsequently recognised in several cases. (*m*)

Another exception has been made in matters of ornament, as ornamental chimney-pieces, pier glasses, wainscoats fixed only by screws and the like. (*n*)

The exception, however, is not extended in favour of agriculture, and therefore, where the tenant of a farm erected a beast-

(*a*) Keilw. 39, a. 2 Rol. Ab. 815, l. 37.

(*b*) 2 Rol. 814, l. 46. City of London v. Greyme, Cro. Jac. 182. Cole v. Green, 1 Lev. 309.

(*c*) 2 Rol. Ab. 815, l. 39.

(*d*) Co. Litt. 53, a.

(*e*) Co. Litt. 54, a. 2 Inst. 330.

(*f*) Co. Litt. 53, a. Heriakenden's Case, 4 Rep. 63, b. Elwes v. Maw, 3 East, 51.

(*g*) Buckland v. Butterfield, 2 Brod. & Bing. 58.

(*h*) Per Dallas, C. J., Steward v. Lombe, 4 B. Moore, 288.

(*i*) Y. B. 42 Ed. 3, 6. 20 H. 7, 13.

(*k*) Elwes v. Maw, 3 East, 52.

(*l*) 1 Salk. 368.

(*m*) Penton v. Robarts, 2 East, 88. Elwes v. Maw, 3 East, 28, and the cases cited in 2 Saund. 259. a, note, (*c*).

(*n*) Elwes v. Maw, 3 East, 53. Buckland v. Butterfield, 2 B. & B. 58. Beck v. Rebow, 1 P. Williams, 94. Ex parte Quincey, 1 Atk. 477. Lawton v. Lawton, 3 Atk. 13.

house and other buildings necessary and convenient for the use of the farm, which buildings were of brick and mortar, and tiled, and the foundations of them about a foot and a half deep in the ground, it was held, that the tenant was not justified in carrying them away (*a*); and a conservatory erected by tenant for years on a brick foundation, attached to a dwelling-house, and communicating with it by windows opening into the conservatory, and a flue passing into the parlour chimney, cannot be removed without committing waste. (*b*)

Of waste.

What is waste.

Questions respecting the right to fixtures principally arise between three classes of persons. First, between different descriptions of representatives of the same owner of the inheritance, viz. between his heir and executor. In cases between the heir and the executor, the rule obtains with most rigour in favour of the inheritance, and against the right to disannex therefrom, and to consider as a personal chattel, any thing which has been fixed thereto. Secondly, between the executors of tenant for life or in tail, and the remainderman or reversioner; in which case the right to fixtures is considered more favourably for executors than in the preceding case, between heir and executor. The third case, and that in which the greatest latitude and indulgence has always been allowed in favour of the claim to have any particular articles considered as personal chattels, as against the claim in respect of freehold or inheritance, is the case between landlord and tenant. (*c*)

Things removable in favour of trade, &c. must be severed during the possession of the party entitled, though the severance may be made after the expiration of his interest, if he have not quitted possession. (*d*)

2. In land. It is waste if the tenant digs up the surface of the land, and carries it away. (*e*) So to convert arable ground

In land.

(*a*) Elwes v. Maw, 3 East, 28.

(*b*) Buckland v. Butterfield, 2 Br. and Bing. 58. 4 B. Moore, 440, S. C.

(*c*) Elwes v. Maw, 3 East, 51.

(*d*) Penton v. Robart, 2 East, 88, but if he quits the premises, he cannot recover the value in trover, Horn v. Baker, 9 East, 215. Davis v. Jones, 2 B. & A. 165. Colegrave v. Dias Santos, 2 B. & C. 76. The value of fixtures cannot be recovered in assumpsit for *goods* sold and delivered, Lee v. Risdon, 7 Taunt. 188, but they may be described in trespass, as *goods*, *chattels*, and *effects*, Pitt v. Shew, 4 B. & A. 206. They are not distrainable, Ibid. Clark v. Gaskarth, 8 Taunt. 431, but they may be taken in execution under a *fi. fa.* against the tenant, Pitt v. Shew, 4 B. & A. 207. 2 Saund. 259, b. (n).

(*e*) 2 Rol. Ab. 816, l. 15. Bac. Ab. Waste, (C. 1). Com. Dig. Waste, (D 4). 2 Saund. 259, Note (11).

Of waste.

What is waste.

into wood, or meadow into arable or pasture, for it changes not only the course of husbandry, but the proof of the lessor's evidence. (*a*) So to convert meadow into orchard, though it be melioration (*b*), or a hop garden into tillage. (*c*) But when, by the custom of the country, ploughing a meadow is good husbandry, and for meliorating of the meadow, it is not waste to plough it (*d*); so if trenches are dug in a meadow to draw off the water (*e*); so if meadow be sometimes arable, and sometimes meadow, to plough it is not waste. (*f*) To suffer the land to lie fallow, whereby it is overrun with bushes, &c. is not waste, but bad husbandry (*g*); and to destroy coney-burrows, is not waste, unless there be a warren by charter or prescription. (*h*)

It is waste to suffer a wall of the sea to be in decay, whereby meadow or marsh land is surrounded and becomes unprofitable; but if it be surrounded suddenly by the violence of the sea, without the tenant's default, it is not waste. (*i*)

Digging for gravel, lime, clay, brick-earth, stone, or the like; or for mines of metal, coal, or the like, hidden in the earth, and not open when the tenant came in, is waste; but the tenant may dig for gravel or clay for reparation of the house, in the same manner as he may take timber trees. (*k*) If a lease be made of land in which there are mines, but no mention is made of the mines in the lease, the lessee, if the mines be open, may work them, but he cannot dig for new mines. And if there be open mines, and the owner make a lease of the land *with the mines therein*, this extends to the open mines only, but if there should be no open mines, and the lease is *with the mines therein*, the lessee may dig for mines; for otherwise the words would be void (*l*); but where the mines were wrongfully opened by the lessee, it is waste in his assignee to work them. (*m*) Whether the mines were open at the time of the demise, or whether the lessee opens them, having power to do so by the lease, he cannot cut timber to use

(*a*) Co. Litt. 53, b. Darcy v. Askwith, Hob. 234. Hutt. 19, S. C.

(*b*) Per Periam, J. 2 Leon. 174.

(*c*) Moyle v. Mayle, Owen, 67.

(*d*) 2 Rol. Ab. 814, l. 47.

(*e*) 2 Rol. Ab. 820, l. 23. Darcy v. Askwith, Hob. 234.

(*f*) 2 Rol. Ab. 815, l. 1.

(*g*) 2 Rol. Ab. 814, l. 35. F. N. B. 59 M.

(*h*) Moyle v. Mayle, Owen 66. 2 Rol. Ab. 815. l. 15.

(*i*) Co. Litt. 53, b. Moor, 62. 73.

(*k*) Co. Litt. 53, b. Saunders' Case, 5 Rep. 12. 2 Rol. Ab. 816. l. 1.

(*l*) Co. Litt. 54, b. 2 Rol. Ab. 816. l. 10. Saunders' Case, 5 Rep. 12, b. Astry v. Ballard, 2 Mod. 193.

(*m*) Sanders v. Norwood, Cro. Eliz. 683. 1 Brownl. 241. S. C.

in them. (*a*) It seems that it is waste for a parson, vicar, &c. to dig or open mines in his glebe. (*b*) *Of waste.*

What is waste In woods.

3. Waste in woods, trees, &c. It is waste to cut down timber, or trees accounted timber in particular counties. (*c*) Oak, ash, and elm of twenty years growth, are accounted timber throughout the realm (*d*), and where such trees are scarce, by the custom of the country beech, willow, hornbeam, &c. may be accounted timber (*e*); so may black-thorn (*f*), or white thorn (*g*); so horse-chesnuts, lime, birch, ash, and walnut, may be accounted timber (*h*); and so it seems that pollards may be, if sound and good. (*i*) Cutting down willows, beech, birch, asp, maple, or the like, standing in the defence and safeguard of the house, though not timber, will be waste. (*k*) To lop and top timber trees, or to do any act whereby the timber may decay, is waste. (*l*) If waste be done *sparsim* in a wood, the whole wood shall be forfeited. (*m*)

Underwood.

But it is not waste to cut seasonable wood or underwood. Seasonable wood appears not to be confined to any particular kind of trees, but to include timber trees, as oak, under the age of 20 years, if usually cut and sold. (*n*) Underwood is a species of wood, which grows expeditiously, and sends up many shoots from one shoot, the root remaining perfect from which the shoots are cut, and producing new shoots, and so yielding a succession of profits. (*o*) To cut the underwood of hazel, willows, maple, or oak, if seasonable and usually cut and sold is not waste; but it is waste to dig them up by the roots, or to suffer the germins to be destroyed (*p*), and so if

(*a*) Darcy v. Askwith, Hob. 234. Hutt. 19. S. C.

(*b*) Ambl. 176, a. v. Lord Rutland's Case, 1 Sid. 152. 1 Lev. 107. S. C. Com. Dig. Waste, (D. 4). As to the working of mines in Copyhold land, see Bourne v. Taylor, 10 East, 202.

(*c*) Co. Litt. 53, a. Com. Dig. Waste, (D. 5). Bacon's Ab. Waste, (C. 2).

(*d*) Co. Litt. 53, a.

(*e*) Co. Litt. 53, a. Lady Cumberland's Case, Moor, 812. Pinder v. Spencer, Noy, 30. 2 P. Williams, 606.

(*f*) Cook v. Cook, Cro. Car. 531. 2 Rol. Ab. 819, l. 52, S. C.

(*g*) Cro. Jac. 126. 2 Rol. Ab. 817. l. 12. Hale's Note, Co. Litt. 53, a. (10.)

(*h*) Duke of Chandos v. Talbot, 2. P. Williams, 601.

(*i*) Ibid. but see Soby v. Molins, Plow Com. 470, *contra*.

(*k*) Co. Litt. 53, a. Com. Dig. Waste, (D. 5). Gufley v. Pindar, Hob. 219. F. N. B. 59 M.

(*l*) Co. Litt. 53, a. Dyer, 65, a.

(*m*) 2 Inst. 304.

(*n*) 2 Rol. Ab. 817, l. 25. Brook v. Cobb, 2 Brownl. 150. See 1 B. & C. 379, Note of the reporters.

(*o*) Per Bayley J. R. v. Inhabitants of Ferrybridge, 1 B. & C. 384. *Quære*, distinction between seasonable wood and underwood as to waste.

(*p*) Gage v. Smith, Godb. 217 Co. Litt. 53, a.

Of waste. What is waste.

there be a quickset hedge of whitethorn, to stub it up, or suffer it to be destroyed, is waste. (*a*)

The tenant may take sufficient wood for botes (*b*); but where there is sufficient decayed and dry wood, it is waste to cut down other timber for fuel. (*c*)

Repairs.

The tenant may cut down timber for repairs, even though he be not compellable to make them, as where the house was ruinous at the time of the lease made (*d*), and so, though he covenants to repair at his own charge, for this does not take away the liberty which the law allows (*e*); and though the lessor covenant to repair, if he neglect to do so, the lessee may cut timber for that purpose. (*f*) A tenant may take sufficient wood to repair the walls, pales, fences, hedges, and ditches, as he found them, but not to make new pales, &c. (*g*); nor where the repairs are unnecessary (*h*); nor may he sell the trees, and employ the money upon repairs, nor sell them and repurchase them and employ them upon repairs (*i*); nor may he cut down timber for the purpose of employing it in repairs when there shall be occasion, the premises not requiring repairs at the time (*k*); but when a copyholder for life cut trees, though none were applied to the repair of the premises till several months afterwards, and after ejectment brought for the forfeiture, and most of them still remained unapplied, but parts of the premises were still out of repair, it was held to be a question for the jury, whether the trees were cut down *bona fide* for the purpose of repairing the premises, and were in a due course of application for that purpose. (*l*) Where the repairs are necessary in consequence of the tenant's own default, it is waste to cut timber to amend them (*m*); nor can the tenant cut timber for the use of mines (*n*), but he may cut timber for repair of things useful, though they be not absolutely necessary, as for water-troughs to be fixed in the ground for his cattle. (*o*)

(*a*) Co. Litt. 53, a.
(*b*) Co. Litt, 53, b. 2 Rol. Ab. 820. l. 10. F. N. B. 59 N.
(*c*) Co. Litt. 53, a.
(*d*) Co. Litt. 54, b. See Dyer, 36, a.
(*e*) Moor, 23.
(*f*) Co. Litt. 54, b.
(*g*) Co. Litt. 53, b.
(*h*) 2 Rol. Ab. 822, l. 40.
(*i*) Co. Litt. 53, b. Danby v. Hodgson, 3 Lev. 323.
(*k*) Gorges v. Staufield, Cro. Eliz. 593.
(*l*) Doe d. Foley v. Wilson, 11. East, 56.
(*m*) 2 Rol. Ab. 823, l. 3. F. N. B. 59 K.
(*n*) 2 Rol. Ab. 823, l. 30. Darcy v. Askwith, Hob. 234.
(*o*) 2 Rol. Ab. 823, l. 22. Com. Dig. Waste, (D. 5).

Of waste.

What is waste.

In a very late case in a writ of waste, where it appeared that the defendant had, (though not within six years) cut down timber on an estate in the proportion of thirty-seven to fifty, but it was admitted that many of the trees had been felled for the benefit of the estate, the jury, who were directed to find for the plaintiff, if they thought the felling injurious to the inheritance, for the defendant, if not injurious, having found for the defendant, the court granted a new trial. (*a*)

In gardens, &c.

4. In gardens, dovecotes, &c.—Waste may be committed in a garden, or orchard, by cutting down the fruit trees growing therein; but if the trees grow upon any ground which the tenant holds out of the garden or orchard, it is no waste. (*b*) It is waste for the out-going tenant of garden ground to plough up strawberry beds in full bearing, although when he entered he paid for them, on a valuation, to the person who occupied the premises before him, and although it may have been usual for strawberry beds to be appraised and paid for as between outgoing and incoming tenants. (*c*) If fruit trees are overthrown by the wind, but still continue to bear fruit, it is waste to dig them up. (*d*) It is waste if a tenant destroys the stock of a dovecote, warren, park, fishpond, &c. or takes so many as not to leave a stock equal to that which he found when he became tenant (*e*); but it is said to be no waste if the tenant leave a sufficient stock. (*f*) It is waste to throw down the pales of a park, or warren, or to suffer them to decay (*g*); or to stop up the holes of a dovecote; or to throw down the banks of a fishpond, lake, &c. (*h*)

What shall not be accounted waste.

If the value of waste done do not amount to 40*d.* the tenant is dispunishable, and if damages under that amount be found, judgment may be given for the defendant. (*i*) But where the value amounted to 40*d.* it has been allowed to be waste, and several particulars may be united to make such value. (*k*)

(*a*) Redfern v. Smith, 1 Bingh. 382.

(*b*) 2 Rol. Ab. 817, l. 35. Co. Litt. 53, a. Com. Dig. Waste, (D. 3). Bacon's Ab. Waste, (C. 4).

(*c*) Watherell v. Howels, 1 Campb. 227.

(*d*) 2 Rol. Ab 817, l. 35.

(*e*) Co. Litt. 53, a. 2 Inst. 304. 4 Leon. 240.

(*f*) Vavasour's Case, 2 Leon. 222.

(*g*) Moyle v. Mayle. Owen, 66. Co. Litt. 53, a.

(*h*) Moyle v. Mayle, Owen, 67.

(*i*) Co. Litt. 54, a. Com. Dig. Waste, (E. 1). Wms. Note, 2 Saund. 250. (6) and see *post* in Judgment in Waste, and Gov. of Harrow School v. Alderton, 2 Bos. & Pul. 86; according to Winch, 5, the value is 40*s.*

(*k*) Co. Litt. 55, a. 2 Rol. Ab. 824, l. 20. F. N. B. 60 C.

Of waste.

What is not waste.

No part of demise.

If the place in which the waste is supposed to be done is no part of the land demised, no action of waste will lie, as if the lessor demises, excepting the woods or trees, and afterwards the lessee cuts down the woods or trees, this is no waste (*a*); but if there be a proviso that it shall be lawful for the lessor to cut down trees, waste lies if the lessee cuts them down, for this is a covenant and not an exception. (*b*) If a lessee assigns his estate to A., excepting the woods, and A. afterwards cuts them down, waste will lie against him, for as to the lessor, they are parcel of the demise (*c*); and so if he assigns excepting the mines, or the gravel or clay within the land. (*d*)

Without impeachment.

No action of waste can be maintained if the lease was made without impeachment of waste. (*e*) According to the older authorities the lessee in such case might utterly waste the premises, pull down the houses, &c. (*f*); but in later times, courts of equity have interfered to prevent tenants, without impeachment of waste, from destroying the property (*g*); and Lord Mansfield inclined to adopt the same rule in courts of law. (*h*) The clause, without impeachment of waste, should be contained in the same deed as the demise, for if it be in another deed, it only amounts to a covenant (*i*), and it must be by deed. (*k*) The privilege is annexed to the estate, and if that be changed by confirmation, or otherwise, it is gone. (*l*) And if a tenant in tail makes a lease without impeachment of waste, it does not bind the issue, though he accepts the rent. (*m*) A lease with all timber trees, sales of wood, &c. is not without impeachment. (*n*)

Act of lessor.

If the waste be done, or occasioned, by the lessor himself, no action lies, as where trees are cut by the lessor, or by his command (*o*); so if the lessor cut down a quickset, or other fence, by which cattle escape into a wood demised, and destroy the ger-

(*a*) Dyer, 19, a. Adm. Cro. Eliz. 690. Goodright v. Vivian, 8 East, 190.

(*b*) Lushford v. Sanders, Cro. Eliz. 690.

(*c*) 2 Inst. 302. Foster v. Spooner, Cro. Eliz. 17. Sanders v. Norwood, Cro. Eliz. 683. Saunders's Case, 5 Rep. 12, b.

(*d*) Saunders's Case, 5 Rep. 12, a. see *ante*, p. 116.

(*e*) Moor, 327. Com. Dig. Waste, (E. 3).

(*f*) Ibid. Co. Litt. 54, b.

(*g*) Vane v. Lord Bernard, 2 Vern. 738. Rolt v. Lord Somerville, 2 Ab. Eq. 759. Co. Litt. 220, a. Note (1).

(*h*) Pyne v. Dor, 1 T. R. 55.

(*i*) Bowles v. Berrie, 1 Rol. R. 183.

(*k*) 2 Inst. 146.

(*l*) Bowles v. Berrie, 1 Rol. R. 183. Bowles's Case. 11 Rep. 83, b.

(*m*) Ibid.

(*n*) Darcy v. Askwith, Hob. 234, Com. Dig. Waste, (E. 3).

(*o*) 2 Rol. Ab. 822, l. 12. Com. Dig. Waste, (E. 4).

mins there (*a*); or if the lessor cut down trees, and afterwards the lessee's cattle destroy the germins of them (*b*); and if the lessor after waste done, accept a surrender from the lessee, it is dispunishable. (*c*)

Of waste.

What is not waste.

If the waste be done by tempest, lightning, or by the king's enemies, &c. it is dispunishable. (*d*)

Tempest, &c.

At common law (*e*), lessees were not answerable to landlords for accidental or negligent burning (*f*); but the statute of Gloucester, which rendered tenants for life, and for years, liable to waste, without any exception, consequently made them answerable for destruction by fire. By the statute of 6 Anne, c. 31, *all persons* are exempted from actions for accidental fire in any house, except in cases of special agreement between landlords and tenants. It seems doubtful whether tenants of particular estates, coming in by act of law, as tenant in dower, and by the curtesy, who were punishable for waste at common law, are within the statute of Anne; but it is apprehended that they are; the words of the statute being that no action shall be prosecuted against *any person* in whose house any fire shall accidentally begin. (*g*)

Fire.

With regard to its form, the writ of waste may be considered as it relates to the plaintiff; secondly, as it relates to the defendant.

Form of the writ.

The writ supposes the demise to be made by the person by whose lease, in contemplation of law, the tenant is *in*, as if four jointenants lease for life, and afterwards three of them release to the fourth, the fourth in an action of waste brought by him, may state that the defendant holds by lease from himself alone,

(*a*) 2 Rol. Ab. 822, l. 5.

(*b*) Moor, 9.

(*c*) 2 Inst. 304. Co. Litt. 285, a.

(*d*) Co. Litt. 53, a. 2 Inst. 303. Keighley's Case, 10 Rep. 139, b.

(*e*) Hargrave's Note, Co. Litt. 57, a. (1).

(*f*) Fleta, l. 1. c. 12. Lady Shrewsbury's Case, 5 Rep. 13, b.

(*g*) Hargrave's Note, *ubi supra*. If a lessee covenant to repair generally, he is liable on such Covenant if the house be burnt down by fire. Paradine v. Jane, All. 27. Earl of Chesterfield v. Duke of Bolton, Com. 627. Bullock v. Dommitt, 6 T. R. 650; and if there be a Covenant to pay rent, the lessee must do so though the house be burnt down. Monk v. Cooper, 2 Lord Raym. 1477. Belfour v. Weston, 1 T. R. 310; and if the tenant holds under a written agreement, the landlord may recover in an action for use and occupation. Baker v. Holtpzaffel, 4 Taunt. 45. And it seems the lessor is not bound to rebuild, though he insist on payment of the rent. Pindar v. Ainslie, cited 1 T. R. 312. Weigall v. Waters, 6 T. R. 488. 1 Saund. 320, b. Note. 2, 422, a. Note. Whether a court of equity will interfere, see Camden v. Morton, 2 Eden, 219. Brown v. Quilter, Amb. 619. Hare v. Groves, 3 Anstr. 687. Holtpzaffell v. Baker, 18 Ves. 115.

Of waste.

Form of the writ.

for after the release the releasee is in by the first feoffor. (*a*) But it is only in cases where a tenure exists between the lessor and the lessee, that the latter is said to hold *of the demise* of the former; and, therefore, where the action is brought by a remainderman, between whom and the particular tenant there is no tenure, both of them holding of the lord paramount, the writ is, it seems, special, and shall shew the creation of the particular estate, and of the remainder. (*b*) And so in the case of tenant by the curtesy who holds of the lord paramount, and not of the heir, the writ states "wherefore, &c. he committed waste of lands &c. which he holds by the curtesy of England *of the inheritance* of the said A. B.," and not "which the said A. B. demised to him." (*c*) The form seems to be the same in a writ of waste brought by the heir against the tenant in dower, although the dowress holds of him (*d*), because she is in by act of law, and it is said by Harper, J. that when the estate is created by the law, the writ shall allege, that the tenant holds *ex hæreditate*. (*e*) Upon this ground it has been held, that where the tenant comes in under the statute of uses, and is consequently in the *post*, neither by the lessor nor the feoffees, but by act of law, the writ should state generally, that the tenant holds "of the inheritance" of the plaintiff, and not of the demise of any one (*f*); but it may be questioned whether it would not now be considered more proper to allege, that the tenant is in of the demise of the lessor, for there is a strong distinction between the case of a person coming in merely by act of law, as the lord by escheat, and the case of a person who, though strictly in in the *post*, yet comes in by the limitation or act of the party, as in this case. (*g*) When the action is brought by the assignee of the reversion, the writ runs thus, "wherefore, &c. the said C. D. has committed waste in lands which he holds of the said A. B. for the life, &c. under an assignment made thereof to the said A. B. by the said E. F." (the original lessor). (*h*)

With regard to the defendant, the writ of waste is brought

(*a*) 2 Rol. Ab. 831, l. 10. Vin. Ab. Waste, (U. 8.) (W).

(*b*) Cook v. Cook, Hutt. 110. 2 Rol. Ab. 830, l. 38, 831, l. 30.

(*c*) F. N. B. 56 C.

(*d*) F. N. B. 55 C. note (*a*) to 55 E. 2 Dal. 100.

(*e*) 2 Dal. 100.

(*f*) Vavasor's Case, 2 Leon. 223. 3 Leon. 53. Vin. Ab. Waste, (X. 2).

(*g*) Linc. College Case, 3 Rep. 62, b. See *ante*, p. 90.

(*h*) 2 Rol. Ab. 831, l. 41.

Of waste.

Form of the writ.

either in the *tenet* or the *tenuit*. In the *tenet* where the particular estate is still subsisting, and the place wasted is to be recovered with damages, in the *tenuit* where the particular estate has expired, and damages only are sought to be recovered. (*a*)

In the tenet.

Waste lies in the *tenet* against a tenant for life or years, who has committed waste and assigned over, because the title of the reversioner is paramount the title of the assignee, and unless waste in the *tenet* lay, the place wasted could not be recovered. (*b*) It is on this ground that *non-tenure general* is no plea in waste, for though the defendant do not hold the premises, yet he may be liable for waste committed before the assignment, and therefore he must say in his plea, that no waste was done before the assignment. (*c*) Where waste is brought in the *tenet* against tenant for years, and the term expires *pendente lite*, yet the writ shall not abate, for the plaintiff may proceed and recover his damages. (*d*)

In the tenuit.

The writ must be brought in the *tenuit* where the term expires by effluxion of time, as in the case of a lease for years, or where the estate determines by the act of God, as on the death of *cestui que vie*, or where the estate is ended by the act and wrong of the tenant, as if he makes a feoffment in fee, or commits any other forfeiture, and the lessor enters (*e*); but when the tenant commits waste, and afterwards surrenders to the lessor, who agrees to such surrender, the latter, it is said, cannot have an action of waste in the *tenuit*, for he cannot, by his own act, alter the form and nature of his action from the *tenet* to the *tenuit*, and so no action of waste will lie after a surrender. (*f*) Although the writ be not in words brought in the *tenuit*, yet if there be any words in the writ implying that the term is past, it is sufficient. (*g*)

When the action is brought against tenant for life or years, the writ usually recites the statute of Gloucester, and when brought against tenant by the curtesy, the form in the register contains a recital of the statute, but this seems unnecessary. (*h*)

(*a*) Sacheverell v. Bagnol, Cro. Eliz. 356. 2 Inst. 304. Vin. Ab. Waste, (U. 1). (U. 2).

(*b*) 2 Inst. 302. 2 Rol. Ab. 829, l. 43, *ante*, p. 111.

(*c*) Br. Ab. Waste, 22. See *post*, in "Pleas in Abatement." "Non-tenure."

(*d*) 2 Inst. 304. Br. Ab. Waste, 95. Co. Litt. 285, a.

(*e*) 2 Inst. 304.

(*f*) Co. Litt. 285, a. 2 Inst. 304. Fitz. Ab. Waste, 99.

(*g*) 2 Rol. Ab. 830, l. 12.

(*h*) F. N. B. 56 C. Com. Dig. Waste, (C. 4).

Of waste.

If the statute be recited it is sufficient, though not exactly recited. (a)

Form of the writ. Process.

In every writ of waste the plaintiff should conclude to his *disherison* (b), but if the writ be brought by husband and wife, on a lease made out of the inheritance of the wife, it must conclude to the disherison of the wife only. (c)

The process in waste is summons, attachment, and distress, and if the tenant neglects to appear at the return of the *distringas*, a writ of inquiry of the waste done may issue, on the return of which the plaintiff may have judgment. Essoign lies. A view is had by the jury. Receit lies. Damages are recoverable; and costs in certain cases.

Of estrepement.

At common law, if the tenant in a real action commits waste after judgment, and before execution, a writ of estrepement lies. (d) And by the statute of Gloucester, c. 13, the writ may be brought at any time pending the action. The writ is either original or judicial. (e) When original, it may be issued at the same time with the original writ in the real action intended to be prosecuted; when judicial, it cannot be issued until the return of the latter, for until that time the action is not depending in the Common Pleas. (f) The writ may be directed either to the sheriff and the party jointly, or there may be separate writs to each of them. (g) If the tenant makes a feoffment pending the suit, although he still continues tenant in law to the demandant, yet the latter may have a writ of estrepement against him and the feoffee jointly, and so in case of a voucher or prayer in aid. (h) But if a stranger of his own wrong, after the writ delivered to the tenant, does waste against the will of the tenant, the latter shall not be punished for such waste. (i) Where there are two tenants, the demandant may have estrepement against one of them. (k) The tenant, notwithstanding this writ, may

(a) 2 Latw. 1548. Com. Dig. Pleader, (3 O. 1.)
(b) Co. Litt. 285, a.
(c) 2 Rol. Ab. 832, l. 18.
(d) 2 Inst. 328. F. N. B. 61 L. and *quære* whether not at any time *pendente lite*.
(e) 2 Inst. 328. F. N. B. 61 E.
(f) 2 Inst. 328, 9. F. N. B. 61 D. margin.
(g) F. N. B. 61 F. Rast. Ent. 317, a.
(h) 2 Inst. 328.
(i) F. N. B. 61 H. 2 Inst. 328.
(k) 2 Inst. 328.

cut down corn, grass, or underwood, and do any acts which do not amount to waste or destruction. (*a*) Of estrepement.

When brought against the tenant, the writ of estrepement operates as a prohibition, and if he afterwards commits waste, he will be liable to answer for it in damages. (*b*) On this account a doubt has arisen whether a writ of estrepement is maintainable under the statute, *pendente lite*, in those actions in which damages are recoverable, for in real actions, in which damages are recoverable, they are in general recoverable up to the time of verdict; and, therefore, damages for the waste done *pendente lite*, may be recovered in the original action. (*c*) It seems, however, that estrepement will lie, although damages are recoverable in the first action, for no mischief can arise from allowing it, since a recovery of damages in the one, is a bar in the other; and in estrepement *pendente placito*, the demandant cannot recover damages until judgment given in the principal action (*d*); and, moreover, much inconvenience would accrue, if the tenant should be allowed to pull down houses, and afterwards not be able to answer in damages for the waste. (*e*) At all events, there appears to be no objection to issuing the writ to the sheriff, authorising him to prevent the committing of waste; and in cases where no damages are recoverable, as in a writ of right, or are not recoverable *pendente lite*, as in a writ of waste, estrepement clearly lies before judgment. (*f*) So there can be no doubt as to its lying in every case *after verdict* against the tenant. The writ of estrepement lies generally in all real actions, and in a *scire facias* to execute a fine, though no land is demanded; in a *quid juris clamat*, and in attaint (*g*); but in partition no estrepement lies, because both parties are in possession. (*h*)

If the tenant commits waste after a writ of estrepement, the demandant may declare on the writ of estrepement, to which the tenant may plead *no waste committed*, and if it be found by verdict that the tenant has committed waste, the demandant may

(*a*) 2 Inst. 329. F. N. B. 61 C.

(*b*) 2 Inst. 329.

(*c*) 2 Inst. 328. See post, title "Damages."

(*d*) 2 Inst. 328. Com. Dig. Waste, (B. 2). Lord Nottingham's note, Co. Litt. 355, a (1).

(*e*) F. N. B. 60 Y.

(*f*) 2 Inst. 328. Foljamb's Case, 5 Rep. 115, b; and see Ardern v. Darcy, Cro. Eliz. 393.

(*g*) 2 Inst. 328.

(*h*) 2 Inst. 329, but see Noy, 143, *contra*. In Wharod v. Smart, 3 Burr. 1823, the court obliged the plaintiff in error in ejectment, to enter into a rule not to commit waste or destruction during the pendency of the writ of error.

Of estrepement.

have judgment for his damages and costs. (*a*). When the writ of estrepement is directed to the sheriff, he may resist all who would do waste, and imprison them if they resist, and may summon the *posse comitatus* to assist him. (*b*) And it seems, that if the party to whom the writ is directed, afterwards does waste, it is a contempt of the prohibition, and he may be punished accordingly. (*c*)

(*a*) Playstow v. Bacheller, Moor, 100. Com. Dig. Waste, (B. 2). Rast. Ent. 317, a.

(*b*) Foljamb's Case, 5 Rep. 115, b. 2 Inst. 329. Earl of Cumberland v. Countess Dowager, Hob. 85.

(*c*) Earl of Cumberland v. Countess Dowager, Hob. 85.

Of Writs Ancestral Possessory.

Of *aiel, besaiel,* and *cosinage.*

WHEN a stranger abates on the death of the father, mother, brother, sister, uncle, aunt, niece, or nephew of the demandant, it has been shewn that the proper real action is an assise of *mort-d'ancestor;* but when the grandfather, great-grandfather, or collateral cousin, or relation of the demandant, further removed than the degrees above specified, dies seised of lands or tenements, and a stranger abates, the heir, if grandson, may have a possessory ancestral writ, called a writ of *aiel;* if great-grandson, a writ of *besaiel;* or if he be a collateral relative, out of the above degrees, a writ of *cosinage.* In these writs it is sufficient that the ancestor was seised on the day of his death (*a*); and like the assise of *mortd'ancestor,* they will not lie between privies in blood, but the demandant may have a *nuper obiit,* or writ of right *de rationabili parte,* in such case. (*b*)

The aunt and the niece may join in a writ of *aiel* on the seisin of their common ancestor. (*c*) Where a person is entitled to one of these writs, he cannot have another, as a writ of *cosinage* instead of *aiel,* and if he sues out the former writ, the tenant may plead in abatement the seisin of the grandfather. (*d*) It is not necessary to shew *how* cousin in the writ (*e*), though it is in the count. (*f*)

The process in these actions is summons and grand cape before appearance, and petit cape after appearance. They have the usual incidents of a *præcipe quod reddat,* and the jurors do not, as in a *mortd'ancestor,* appear the first day. As the heir may enter upon an abator, these writs are grown obsolete, and ejectment is now brought instead of them.

Of *nuper obiit.*

A *nuper obiit* is an ancestral writ brought to establish an equal division of the land, where, on the death of an ancestor who has

(*a*) F. N. B. 221 D, L. Booth, 200. "Pleas in Abatement."
(*b*) F. N. B. 221 O.
(*c*) Br. Ab. *formedon* 26.
(*d*) F. N. B. 221 N, and see *post* in
(*e*) F. N. B. 221 H. 2 Inst. 308.
(*f*) F. N. B. 221 K. note (*e*).

Of *nuper obiit.*

several heirs, one of them enters and holds the others out of possession. (*a*) It lies where the grandfather, father, brother, uncle, or other ancestor of the demandant, dies seised, in fee-simple, of lands, tenements, or rents, and after such death, one of the heirs of the same ancestor enters and deforces the demandant, in which case, the heir who is deforced may have a *nuper obiit* against the other parcener or parceners. (*b*) This writ only lies where the common ancestor dies seised of lands in fee-simple; for if one sister deforces another of land, of which her ancestor dies seised in tail, a *formedon*, and not a *nuper obiit* lies. (*c*) When the ancestor does not *die seised* of the lands, and one of the coparceners, to whom they have descended, deforces the other, a writ of right *de rationabili parte*, and not a *nuper obiit*, must be brought, the latter writ only lying where the ancestor dies seised (*d*); in which latter case, the two writs are concurrent remedies. (*e*) It can scarcely be necessary in any case to resort to this writ at the present day, for if there be an actual ouster of one of the parceners, which is necessary to maintain this writ, ejectment may be brought. (*f*)

If two coparceners enter, after the death of the ancestor, and deforce a third sister (*g*), and afterwards make partition between them, and one of them aliens her part to a stranger in fee, yet the third sister may have a *nuper obiit* against her two sisters, notwithstanding the alienation, and shall recover the third part of the land not aliened; but for the recovery of the third part of the land aliened, she must bring a writ of *mortd'ancestor* in her own name, and the name of the other coparceners, or a writ of *aiel*, as the case may require. (*h*) A *nuper obiit* lies on the seisin of the great-grandfather (*i*), and between sisters of the half-blood (*k*), and it is said that it lies on the seisin of the father, if he were seised the day that he died, or the day before, for that amounts to a dying seised. (*l*)

(*a*) 3 Bl. Com. 186. Com. Dig. Assise, (E).

(*b*) F. N. B. 197 A. B. R. Booth, 204.

(*c*) F. N. B. 197 A. Robinson on Gav. 106. See *ante*, p. 25.

(*d*) F. N. B. 9 B. Booth, 205.

(*e*) F. N. B. 9 G. *ante*, p. 25.

(*f*) See Adams on Ejectment, 81. and *post* in "Ejectment."

(*g*) See Vin. Ab. Jointenants, (P. a).

(*h*) F. N. B. 197 E. she would now bring ejectment.

(*i*) F. N. B. 197 L.

(*k*) Ibid, G.

(*l*) Fitz. Ab. Nup. ob. 10. F. N. B. 197 L.

The process in *super obiit*, is summons and grand cape before appearance, and petit cape after appearance. Essoign lies, but neither view nor voucher. The judgment is, as it seems, to hold again in coparcenary. (*a*)

(a) See *post*, under the proper heads.

Of the Writ of Partition.

Of partition.

For parceners.

A WRIT of partition lies at common law for one or more parceners against the other or others (*a*); and if one parcener after issue had, dies, whereby her husband is tenant by the curtesy, a writ of partition will lie against the husband. (*b*) So if one parcener aliens in fee, the other may, at common law, have this writ against the alienee, and if there are three coparceners and the eldest marries, and the husband purchases the part of the youngest, though the husband be in respect of his own part a stranger, yet he and his wife may have a writ of partition at common law against the middle sister, for he is seised of one part in right of his wife. (*c*) If one parcener makes a lease for life, no writ of partition lies at common law, for she and her coparcener do not then hold the freehold *insimul et pro indiviso* according to the words of the writ, though if the lease be for years only, the writ lies, for the freehold then continues in parcenary. (*d*) So if one coparcener disseises another, no writ of partition can be had during the disseisin (*e*); and neither tenant by the curtesy, nor the alienee of a parcener was entitled to this writ at common law. (*f*)

For jointenants and tenants in common.

At common law jointenants and tenants in common could not have a writ of partition; but it is given to jointenants and tenants in common of any estate of inheritance in their own right or in right of their wives by statute 31 Hen. 8, c. 1; and to jointenants and tenants in common, where one or all have an estate for life or years, by statute 32 Hen. 8, c. 32. (*g*) Under these statutes the alienee of a parcener, who is a tenant in common, and the tenant by the curtesy, may have a writ of partition. (*h*)

If there be three parceners and a stranger purchase the part of one of them, he and one of the other coparceners cannot join in one writ. (*i*)

(*a*) Litt. sec. 247. Com. Dig. Parcener, (C. 6). Booth, 244. Robinson on Gavelkind, 109. Allnatt on Partition, 32.

(*b*) Litt, sec. 264. Co. Litt. 174, b.

(*c*) Co. Litt. 175. F. N. B. 61 S.

(*d*) F. N. B. 62 G. Co. Litt. 167, a. and see Co. Litt. 46, a.

(*e*) Co. Litt. 167, a.

(*f*) Co. Litt. 175, a.

(*g*) Com. Dig. Parcener, (C. 6).

(*h*) Co. Litt. 175, a. b.

(*i*) Co. Litt. 175, b. Ballard v. Ballard, Dyer, 128, a. Robins. on Gav. 109.

Of partition.

Where the partition is to be between two jointenants or tenants in common of an estate of inheritance, the writ may be general, merely referring to the statute (*a*), (31 Hen. 8, c. 1); but, if the partition is to be made between tenants for life or years under the 32 Hen. 8, c. 32, it seems doubtful whether it should not be special and shew the particular estates. (*b*)

Process, &c.

The process in partition was formerly summons, attachment, and distress, and is now governed by the statute 8 and 9 W. 3, c. 31, by which it is enacted, that after process of attachment returned, and affidavit made of the service of notice of the action upon the tenant, and copy left with the occupier, &c. or tenant in possession, &c. forty days before the return of the attachment, if the tenant, &c. do not appear in fifteen days after the return of the attachment, the demandant having entered an appearance for him, and declared, the court may proceed to examine his title, give judgment by default, and award a writ to make partition, which being executed after eight days' notice to the occupier, or tenant, &c. final judgment may be entered. But if the tenant, &c. within one year after such judgment, shew good matter in bar of the partition, the court may set aside the judgment and admit him to plead.

The mode of examining the demandant's title under this statute is as follows. The demandant having declared, according to the statute, a rule to shew cause, why the court should not proceed to examine his title, must be moved for, and on this rule being made absolute, the court will appoint a day to proceed on the examination in open court. On that day, the demandant must open his title and prove his case by affidavits of the seisins, descents, &c., and must produce the assurances under which he claims. If the court is satisfied with his title, a writ of partition will be awarded. (*c*) On the return of this writ, the demandant may move for final judgment. (*d*) The act of 8 and 9 W. 3. only applies to cases where the tenant does not appear. (*e*)

The writ of partition at common law has fallen into disuse on account of the relief afforded by the Court of Chancery. (*f*)

(*a*) Moor v. Onslow, Cro. Eliz. 759. Yate v. Windnam, Cro. Eliz. 64.

(*b*) Moor v. Onslow *ubi sup.* but see Tayler v. Sayer, Cro. Eliz. 743, and see a distinction taken in stating title between Parceners and Jointenants and Tenants in common. Cro. Eliz. 64.

(*c*) Halton v. Earl of Thanet, 2 W. Bl. 1134.

(*d*) *Ibid.* 1159.

(*e*) Dyer v. Bullock, 1 Bos. and Pul. 344.

(*f*) See the Appendix.

Of the Writ of Quod ei deforceat.

Of *quod ei deforceat.*

BEFORE the statute of Westminster 2, 13 Ed. 1, c. 4, when tenants in dower, by the curtesy, or for life, lost lands by default, they were without any remedy; for, from the nature of their estates they could not maintain a writ of right (*a*); though if the tenant had not been duly summoned, he might have had a writ of deceit, which is still in such case a concurrent remedy with the writ of *quod ei deforceat.* (*b*) By the statute of Westminster 2, c. 4, a writ of *quod ei deforceat* is given to tenant in tail, frankmarriage, dower, by the curtesy, and for life, when they have lost their lands by default; but the writ for the tenant in dower, and by the curtesy is said only to lie by the equity of the statute. (*c*) There may be a *quod ei deforceat*, upon a *quod ei deforceat* in which judgment has been given by default (*d*); and the writ may be brought for copyhold lands. (*e*) If the particular tenants who are aided by the statute of Westminster 2 in case of judgment by default, lose their lands by action tried, it seems that they are without remedy. (*f*) If lands are lost in a court baron by default, a *quod ei deforceat* may be brought either in the inferior court, or in the Common Pleas. (*g*)

For whom it lies.

Coparceners, tenants in tail, who have lost lands by default, although the default of one is not the default of another, may join in a *quod ei deforceat.* (*h*) As may also two men heirs in tail in gavelkind. (*i*) But if tenant in tail lose lands by default and die, the issue in tail must bring a *formedon*, and not a *quod ei deforceat.* (*k*) If A. and B. are seised of lands to them and to the heirs of A., and a recovery is had against them by default, A. must bring a writ of right for his moiety, and B. a *quod ei*

(*a*) Co. Litt. 355, a. F. N. B. 155 B. 2 Inst. 350. Gilb. Executions, 292.
(*b*) F. N. B. 155 D.
(*c*) F. N. B. 8 D, 155 D. Reg. Br. 171, b. 2 Inst. 353. This appears to be a mistake, as to tenants in dower, who are mentioned expressly in the statute.
(*d*) Br. Ab. *Quod ei deforceat*, 13.
(*e*) Heydon's Case, 3 Rep. 9, a.
(*f*) Ferrar's Case, 6 Rep. 8, b.
(*g*) F. N. B. 155 E.
(*h*) F. N. B. 155 H.
(*i*) Br. Ab. *Quod ei def.* 5.
(*k*) F. N. B. 155 F. 2 Inst. 351.

deforceat, and when they have recovered they shall hold as jointenants again. (*a*)

Of *quod ei deforceat.*

If a woman lose lands by default and then marry, she and her husband may have a *quod ei deforceat* (*b*); but where husband and wife seised of lands in right, and for the life of the wife, lose them by default, it was at one time a doubt whether the husband and wife could maintain a *quod ei deforceat*, because the statute gives that writ to tenant for life, and here the husband is not tenant for life, but only seised in right of his wife. (*c*) It is however decided, that in such case the writ will lie. (*d*) But if husband and wife seised in right of, and for the life of the wife, lose the lands by default, the wife, after the death of the husband, must resort to her writ of *cui in vitâ*, which is expressly given to her in such case by the statute of Westminster 2, c. 3, and cannot maintain a *quod ei deforceat*. (*e*)

Against whom.

This writ may be brought against a stranger to the former recovery if he be tenant of the land lost (*f*), as against the feoffee of the recoveror (*g*), for the words of the statute are general, and unless this were allowed, the demandant would not be able to obtain restitution of the land. (*h*)

Upon what default in prior action.

If the tenant in the first action appears, and afterwards departs in despite of the court, this is such a default within the statute as entitles him to bring a *quod ei deforceat* (*i*); and yet upon a judgment by *nihil dicit*, which is said to be a sort of confession of the action, no *quod ei deforceat* will, as it seems, lie (*k*); nor will it lie after a default in a writ of right, after the mise joined. (*l*)

If tenant for life vouches, and the vouchee will not appear, in consequence of which the tenant loses by default, he may still have a *quod ei deforceat*, though the judgment is not, in fact, given on his own proper default, for the statute of Westminster 2, says, generally, *per defaltam* and not *per defaltam suam*; and, besides, the default of the vouchee is, in law, the default of

(*a*) 2 Inst. 351.
(*b*) F. N. B. 155 F.
(*c*) O. N. B. 223, a.
(*d*) Co. Litt. 356, a. F. N. B. 156 A. 2 Inst. 350; but if the recovery be had by agreement of the husband, he cannot have this writ. 2 Inst. 350.
(*e*) Co. Litt. 356, a. F. N. B. 156 C. 2 Inst. 343. Gilb. Executions, 303.
(*f*) O. N. B. 222, b.
(*g*) F. N. B. 155 F.
(*h*) 2 Inst. 352.
(*i*) Fitz. Ab. *Quod ei def.* 9. F. N. B. 155 I. 2 Inst. 351.
(*k*) Elmer v. Thacker, Cro. Eliz. 263. 2 Inst. 351.
(*l*) 2 Inst. 351. F. N. B. 155 I.

Of *quod ei deforceat.*

the tenant. (*a*) But if the vouchee appears, and enters into the warranty, and afterwards loses by default, the tenant cannot have a writ of *quod ei deforceat*, because he may have judgment to recover over in value against the vouchee, and so obtain a recompense; and this is the reason why, after a common recovery, the tenant in tail cannot implead the recoveror in a *quod ei deforceat.* (*b*)

If tenant for life makes default in a real action brought against him, whereupon the reversioner is received, and pleads to issue, and it is found against the tenant by receit, and judgment is given for the demandant, yet the tenant may afterwards bring a *quod ei deforceat;* for although there is a verdict given, yet the judgment is entered as upon the default. (*c*)

It is a doubtful point whether a *quod ei deforceat* will lie after a judgment by default in a writ of waste, for not appearing at the return of the *distringas*, because on such default a writ issues by the statute of Westminster 2, to the sheriff, to inquire of the waste done (*d*); and consequently the verdict of twelve men would be avoided, which the statute never intended. (*e*) The same doubt arises with regard to a recovery by default in assise, where the recognitors give their verdict on the default of the defendant. (*f*)

Form of the writ.

The form of the writ of *quod ei deforceat* is extremely simple, neither stating the commencement of the particular estate which the plaintiff has lost by default, nor noticing the former recovery in which he lost it. (*g*)

The process in a *quod ei deforceat* is summons and grand cape before appearance, and petit cape after appearance. Essoign lies, but no view. The tenant may vouch, and so may the demandant, under certain restrictions. (*h*)

Of *quod ei deforceat* in Wales.

By the common law, confirmed, as it seems, by the statute of Ruthland, 12 Edw. 1, a *quod ei deforceat* may be brought in

(*a*) 2 Inst. 351. F. N. B. 156 B. Gilb. Executions, 301.

(*b*) F. N. B. 156 B. Gilb. Executions, 302.

(*c*) 2 Inst. 351. F. N. B. 156 B. See *post*, in "Receit."

(*d*) 2 Inst. 389.

(*e*) See the arguments fully stated in Co. Litt. 355, b, and Lord Nottingham's note, (310). Held by two judges against one in Elmer v. Thacker, Cro. Eliz. 263. Owen, 101 S. C. that it lies. *Contra*, O. N. B. 222, b. F. N. B. 155 E. 2 Inst, 351. Gilb. Executions, 296.

(*f*) See the above authorities, and Br. Ab. *Quod ei def.* 4, 14.

(*g*) F. N. B. 155. 2 Inst. 351. Br. Ab. *Quod ei def.* 6. Gilbert's Executions, 297, 303.

(*h*) See *post*, under the proper heads.

Wales, and prosecuted by protestation in the nature of whatever real action the demandant pleases. (*a*) The statute of Ruthland, which appoints a general writ, and directs the demandant to make his protestation to sue in the nature of what writ he pleases, extends as well to real actions at common law, before the 12 Edw. 1, as to such as are given by statute since. (*b*) Thus a *quod ei deforceat* in Wales, may be prosecuted in the nature of a writ of right, in which the trial may be by twelve common jurors, by the statute of Ruthland (*c*); or in the nature of a writ of *formedon* (*d*); or of a writ of entry *sur disseisin* (*e*); or of the *quod ei deforceat*, given by the statute of Westminster (*f*); and a common recovery may be suffered of lands in Wales by this writ. (*g*)

Of *quod ei deforceat* in Wales.

(*a*) Br. Ab. *Quod ei def.* 9. Gryffyth v. Lewis, Cro. Car. 445. Sir W. Jones, 380 S. C. Buckley v. Rice Thomas, 1 Plow. 126, a. 2 Saund. 38, (note).

(*b*) Gryffith v. Lewis, Cro. Car. 445.

(*c*) Pearyn's Case, 5 Rep. 85, b. Jenk. Cent. 259. Gryffyth v. Jenkins, Cro. Car. 179.

(*d*) Gryffyth v. Lewis, Cro. Car. 444.

(*e*) Careswell v. Vaughan, 2 Saund. 29.

(*f*) Gryffyth v. Lewis, Cro. Car. 445. W. Jones, 380, S. C.

(*g*) Winne v. Lloyd, 1 Lev. 130.

Of the Writ of Deceit.

Of *deceit*.

For non-summons.

WHEN a tenant in a real action has lost lands by default, in consequence of his not having been summoned by the sheriff, he may have a writ of *deceit*, which in this case is a judicial writ, issuing out of the Common Pleas, in which the former action was brought (*a*), against the recoveror in that action, and against the sheriff for his false return, and by this writ the party shall be restored to his land again. (*b*) It seems doubtful whether the tenant can have this writ for non-summons on the original writ, when he has been actually summoned on the grand cape, for in that case he might have come in on the return of the grand cape, and have waged his law of non-summons (*c*); and so it is doubtful whether it will lie if the sheriff has actually summoned the tenant upon the land, but has neglected to make proclamation according to the statute 31 Eliz. c. 3. (*d*) It seems that the tenant may have this writ after judgment given for the demandant, and before any entry or possession by him, for if the tenant must wait until the demandant enters, the latter may deprive him of his remedy by forbearing to enter, until the summoners in the *præcipe quod reddat*, and the summoners, viewers, and pernors in the grand cape, are dead; in which case, no writ of *deceit* will lie. (*e*) But though the summoners, &c. be dead, an action on the case may still be maintained against the sheriff. (*f*)

This writ lies, in general, in every case where the tenant in a *præcipe quod reddat*, in which he ought to be summoned, is not summoned, and thereby loses his land by default. So it lies in

(*a*) Jenk. Cent. 122. Rast. Ent. 221, b. or an original may be sued out of Chancery. F. N. B. 99 G. Booth, 252.

(*b*) F. N. B. 97 C.

(*c*) 50 Ed. 3, 17, a. The writ recites, that the tenements were never taken into the king's hands. Rast. Ent. 221, b.

(*d*) Collett v. Marsh, Cro. Eliz. 371, 397. Moor, 349 S. C. The mode of taking advantage of such an irregularity is by moving to set aside the writ of grand cape, or the judgment by default, see *post*.

(*e*) F. N. B. 97 C.; but see Fitz. Ab. Disceit, 47.

(*f*) 1 H. 6, 1. 6 Edw. 4, 3. Hale's note, F. N. B. 97 C. (*a*). Jenk. Cen. 27.

a *quare impedit* (*a*), and in a *scire facias*, to execute a fine (*b*); and so in an action of waste where the tenant loses by default for not appearing on the *distringas* (*c*), although a writ issues in that case to inquire of the waste done, by statute Westminster 2, and therefore the recovery is not strictly by default, and it lies after waste in the *tenuit*, though the defendant can only be restored to his treble damages, and not to the land. (*d*) *Deceit* lies also where a tenant has not been summoned on a re-summons. (*e*)

Of *deceit.*

For non-summons.

In general, any tenant in a real action, who loses his land for want of summons, may have this writ; so may the heir of the tenant who has thus lost lands by default. (*f*) And it seems, that a vouchee may have a writ of *deceit* for non-summons on the summons *ad warrantizandum*, and grand cape *ad valenciam*. (*g*) If a tenant for life loses by default, not having been summoned, and dies, the reversioner cannot have a writ of *deceit*, because he cannot have a writ of error, unless by statute. (*h*) He should have prayed to be received. (*i*)

For whom it lies.

If the person who recovered in the former action by default is dead, the writ lies against his heir. (*k*) So if he aliens the land, it lies against him and his alienee; and if he who recovered is dead, against his heir and the alienee. The summoners upon the original in the first action, the summoners and viewers upon the grand cape, and the sheriff to whom the writ in the first action was directed, are likewise made parties to the writ of *deceit*. (*l*) It is said to be optional with the plaintiff to bring his writ of *deceit* against the person who recovered in the former writ, and join the terre-tenant; or to bring it against the person who recovered alone; and after the *deceit* found, to issue a *scire facias* against the terre-tenants. (*m*) In *deceit* upon judgment by default in waste, or *quare impedit*, the summoners and pledges

Against whom.

(*a*) Fitz. Ab. Disceit, 15. F. N. B. 98 G. Blour's Case, Dyer, 353, b. 1 Leon. 293 S. C.

(*b*) F. N. B. 97 D.

(*c*) Fitz. Ab. Disceit, 56. F. N. B. 98 B. 1 Rol. Ab. 622, l. 1.

(*d*) Br. Ab. Disceit, 39, and see *ante*, p. 134, and *post*, "Receit."

(*e*) 1 Rol. Ab. 621, l. 49. Br. Ab. Disceit, 13.

(*f*) F. N. B. 98 Q. 1 Rol. Ab. 622, l. 25. Jenk. Cent. 113.

(*g*) Br. Ab. Sav. Def. 42.

(*h*) F. N. B. 99 E.

(*i*) Vide *post*, in "Receit."

(*k*) 1 Rol. Ab. 622, l. 29.

(*l*) Jenk. Cent. 122. Rast. Ent. 221, b.

(*m*) Hale's note, F. N. B. 97 C. (b). 1 Lutw. 713. Fitz. Ab. Disceit, 8.

Of *deceit.*

For non-summons.

upon the attachment, or the person who made the attachment and the mainucaptors upon the *distringas*, must be made parties to the writ of *deceit.* (*a*)

At the return of the writ, the parties against whom process issues ought to appear in court, in order that they may be examined by the justices as to the fact of summons. If one of the summoners only appear, he ought to be immediately examined, (for he may happen to die before the other summoners are brought into court), and process is then awarded against the others. (*b*) And so if the sheriff and the tenant who ought to appear are returned *nihil*, the summoners who appear are to be examined immediately, although the tenant be absent, for should all the summoners die before the tenant appears, the plaintiff would be deprived of his writ of *deceit.* (*c*) So also where the writ of *deceit* was brought by four, and three of the plaintiffs only appeared, it was held that the summoners should be examined *de bene esse*, before the summons *ad sequendum simul* was awarded. (*d*) If the summoners upon the original appear, but the summoners and viewers upon the grand cape do not appear, the first summoners must be examined, and if it appear from their testimony, that the tenant in the first action was not duly summoned, the judgment in that action shall be reversed. (*e*) If one of the summoners says, that the summons was not made, and the other says that it was made, the plaintiff shall recover. (*f*) And if one of the summoners be returned dead by the sheriff, the other may still be examined. (*g*) If the tenant does not appear, and it is found that no summons was made, it seems doubtful whether the plaintiff can have judgment immediately to recover the land, or whether the judgment ought not to be stayed, and further process issued against the tenant, because it is possible that he may have a release to plead. (*h*)

Process.

In the writ of deceit, the process is properly attachment, and distress infinite, but, in deceit for non-summons, the writ is said to be in the nature of an *audita querela*, and the process is a

(*a*) F. N. B. 99 C. Fitz. Ab. Disceit, 56, *quære* the course now.
(*b*) 1 Rol. Ab. 622, l. 40.
(*c*) 1 Rol. Ab. 622, l. 43.
(*d*) Br. Ab. Disceit, 27.
(*e*) 1 Rol. Ab. 622, l. 35.
(*f*) Hale's note, F. N. B. 97 C. (c). Br. Ab. Disceit, 25.
(*g*) F. N. B. 98 D.
(*h*) 1 Rol. Ab. 622, l. 49, 623, l. 5. Br. Ab. Disceit, 12. Hale's note, F. N. B. 97 C. (b).

venire facias in nature of a summons. (*a*) The judgment is to recover the land and the mesne issues. (*b*)

Of *deceit.*

It is probable, that the courts would now set aside the judgment by default on motion, upon affidavit that the tenant had never been summoned (*c*), and thus the trouble and expense of a writ of deceit, which could scarcely be carried through at the present day, would be avoided. The tenant, who has lost, may likewise, if he pleases, bring another action to recover the land. If he be tenant in fee, a writ of right, or, if he be only tenant for life, a *quod ei deforceat* under the statute of Westminster 2. (*d*)

For non-summons.

A writ of deceit also lies where land, which is held in ancient demesne, is recovered in the king's court, for, as the judgment in the courts at Westminster is evidence to shew that the land is frank fee, and not impleadable in the court of ancient demesne, the lord in ancient demesne may have this writ, to avoid the judgment so given in the superior court. Thus, if a man levies a fine in the Common Pleas, of lands which are held in ancient demesne, a writ of deceit lies for the lord (*e*), and so a common recovery suffered in the Common Pleas may be avoided (*f*), so also a recovery in assise. (*g*) This writ is an original writ (*h*), and should, it is said, be brought in the court in which the deceit has been done. (*i*)

For impleading lands in ancient demesne in the king's court.

Though there be lands held of the manor in ancient demesne, yet the demesne lands of the manor and the manor itself are impleadable at common law (*k*), and copyholds of a manor are not ancient demesne, for they are part of the demesnes. (*l*)

It is said, that a judgment given in the king's court is sufficient without execution to render the lands frank fee (*m*), and, that a fine *sur done grant & render*, which is executory as to the render, will have the same effect before execution. (*n*) Deceit lies after five years passed from the time of a fine levied, because, as it is said, the fine is *coram non judice*, and merely void, and so it lies though the conusor be dead. (*o*)

(*a*) Booth, 252.
(*b*) See *post*, in "Damages."
(*c*) Searle v. Long, 1 Mod. 248.
(*d*) See *ante*, p. 132.
(*e*) 1 Rol. Ab. 326, l. 1. F. N. B. 9, A. 1 Ld. Raym. 712. Smith v. Frampton, 3 Lev. 405.
(*f*) R. v. Hadlow, 2 W. Bl. 1170.
(*g*) 1 Rol. Ab. 324, l. 21.
(*h*) 1 Ld. Raym. 712. Zouch v. Thompson, 3 Lev. 419.
(*i*) O. N. B. 81, a.
(*k*) Baker v. Wich, 1 Salk. 56.
(*l*) Smith v. Frampton, 3 Lev. 405. Com. Dig. Anc. Dem. (B.)
(*m*) Hale's note, F. N. B. 13 C, (*a*).
(*n*) 1 Rol. Ab. 324, l. 15.
(*o*) Zouch v. Thompson, 1 Salk. 210, 1 Lord Raym. 177, S. C.

Of *deceit.*

For impleading lands in ancient demesne in the king's court.

If lands held of a manor in ancient demesne have been twice impleaded in the king's court, as when two fines at different times have been levied of the same lands, the last fine cannot be reversed by a writ of deceit, while the first stands in force, for, at the time when it was levied, the lands were in fact frank fee; but the levying of the last fine will not prevent the first fine from being reversed, after which the last may be reversed also. (*a*)

For whom it lies.

The king, when he is lord in ancient demesne, may have this writ (*b*) and it is sufficient if the plaintiff be *dominus pro tempore* (*c*), as tenant for years. (*d*)

Against whom.

It is said, that where a fine is levied of lands in ancient demesne, by which remainders in tail are limited, it is sufficient to bring the writ of deceit against the tenant of the land without joining those in remainder (*e*), and so it is said to be sufficient to bring the action against the conusor alone, and to make the terre-tenants parties by *sci. fa.* (*f*), but the best mode of proceeding appears to be to make all the parties to the fine or recovery, and the terre-tenants also, defendants. In an action of deceit brought to reverse a recovery, where the vouchee, to whose use the recovery was suffered, was alone made defendant, the court held, that the demandant and tenant in the recovery ought to have been joined in the action. (*g*) If the conusor and conusee of a fine be both dead, the writ may be brought against their heirs. (*h*)

If a fine be levied of lands, part of which are ancient demesne, and part frank fee, and deceit is brought, the fine may be reversed as to that part only of the lands which are ancient demesne, and shall not be taken off the file, but shall be marked, in order to signify that it is cancelled as to that part. (*i*)

The effect of a judgment in a writ of deceit to reverse a fine has been much disputed. In the precedent in Rastal, the judgment runs, (*k*) "that the plaintiff have his court again, and, that the tenements be again impleadable therein, and, that the plain-

(*a*) Hale's note, F. N. B. 97 D. (*b*.) Cockman v. Farrer, T. Raym. 462.

(*b*) R. v. Mead, 2 Wils. 17.

(*c*) Zouch v. Thompson, 1 Salk. 210.

(*d*) 1 Rol. Ab. 327, l. 7.

(*e*) Thel. Dig. l. 5, c. 17, s. 2, as to issuing a *sci. fa.* against them, *vide* 21 Ed. 3, 56, a. 1 Lutw. 713. Hale's note. F. N. B. 97 D. (*b*.)

(*f*) Hale's note, F. N. B. 97 D. (*c*.) and see 1 Leon. 290. Cary v. Dancy, Cro. Eliz. 471.

(*g*) R. v. Hadlow, 2 Bl. 1170.

(*h*) Zouch v. Thompson, 1 Salk. 210.

(*i*) Keilw. 43. 1 Leon. 290. 1 Rol. Ab. 775, l 43. W. Jones, 374. Cruise on Fines, 299. F. N. B. 98 P.

(*k*) Rast. Ent. 100; b.

tiff be restored to all that he has lost," but there is a *curia advisari vult* entered as to annulling the recovery. It is said in many books, that by the judgment in deceit, the fine or recovery is absolutely annihilated, and that the conusor, &c. shall be restored to the title and possession which passed by the conveyance. (*a*) The reasons given are, that a fine cannot be reversed as to one person, and stand good as to another (*b*), and also, that the fine is levied *coram non judice* (*c*), and therefore, the cognizance, although upon record, is no estoppel. On the other hand, it is said, that the fine ought not to be wholly set aside against the conusor's own acknowledgment on record, especially as the sole object of the writ of deceit is to render the lands again impleadable in the court of ancient demesne, and to restore the lord to his privileges. (*d*) If the conusor, however, after the fine levied, releases to the conusee, or confirms his estate, the latter shall retain the land notwithstanding the fine is avoided. (*e*)

Of *deceit*.

For impleading lands in ancient demesne in the king's court.

The process in deceit to reverse a recovery of ancient demesne lands in the king's courts is attachment and distress; the defendant usually confesses the action, and the judgment is, that the plaintiff have his court again, and that the tenements be impleaded in the same court, and brought back within the jurisdiction of the same court, notwithstanding the judgment had in the king's court, that the judgment had in the king's court be annulled and held void, and that the plaintiff be restored to all things which he has lost by reason of that judgment, and the defendants in mercy, &c. The damages are usually remitted.

Process, &c.

(*a*) Lampet's Case, 10 Rep. 50, a. Cary v. Dancy, Cro. Eliz. 471. Zouch v. Thompson, 1 Salk. 210. 1 Lord Raym. 177. 1 Latw. 713, S. C. F. N. B. 98 A.

(*b*) But see T. Jones, 182.

(*c*) Denied by Mr. Preston, Shep. Touch. 10. 1 Conv. 266.

(*d*) See Bac. Ab. Anc. Dem. (C.) Cruise on Fines, 300.

(*e*) Lampet's Case, 10 Rep. 50, a. F. N. B. 98 A. 4 Inst. 490.

Of the Writ of Warrantia Chartæ.

Of *warrantia chartæ.*

A *WARRANTIA CHARTÆ* is an action brought to take advantage of a warranty in lieu of voucher, and by judgment in it the plaintiff may bind the lands of the warrantor, and have damages awarded to him.

A *warrantia chartæ* may be brought either after the plaintiff has been impleaded for the lands warranted, or before, *quia timet.* (*a*) It is grounded either upon an express warranty in a deed, as where one man enfeoffs another by deed, and binds himself and his heirs to warranty (*b*), or, where a man releases or confirms with warranty (*c*), or, upon an implied warranty in a deed, as upon the word exchange in a deed of exchange. (*d*) It may also be grounded upon a warranty which is not created by deed, as upon a lease for life without deed, rendering rent, where the reversion and rent create a warranty. (*e*)

In many cases therefore, voucher and *warrantia chartæ* are concurrent remedies, but, there are others in which *warrantia chartæ* alone can be brought. Thus, when a man is impleaded in any action in which he cannot vouch, he may still bring his *warrantia chartæ*, if he has a warranty, (*f*) as in *quare impedit*, (*g*) assise (*h*), or writ of entry in the degrees, where the warrantor is out of the degrees. (*i*)

A *warrantia chartæ* may be brought before the plaintiff is impleaded in another action for the land, and, if he recovers, this is called a recovery *pro loco et tempore*, upon which no execution can be awarded until some damage actually accrues (*k*); and it may also be brought pending the other action, and, according to Hobart, C. J., even after voucher in that action, and before execution sued. (*l*) If the plaintiff, having brought his *warrantia*

(*a*) Booth, 240. Roll v. Osborn, Hob. 21, 22; the whole law of *warrantia chartæ* may be found in this case.
(*b*) F. N. B. 134 D.
(*c*) 2 Rol. Ab. 809, l. 28, 34. Hob. 21.
(*d*) F. N. B. 135 B.
(*e*) F. N. B. 134 G. Co. Litt. 384, b.
(*f*) F. N. B. 134 D. Hob. 22.
(*g*) Br. Ab. War. Ch. 17.
(*h*) F. N. B. 134 D.
(*i*) Roll v. Osborn, Hob. 22.
(*k*) Br. Ab. War. Ch. 11, Hob. 22.
(*l*) Roll v. Osborn, Hob. 22, 23. Fitz Ab. Gar. de Ch. 8, but see F. N. B. 134 I.

Of *warrantia chartæ.*

chartæ quid timet, have judgment to recover his warranty, (whereby the lands of the warrantor are bound from the purchase of the *warrantia chartæ*), and be afterwards impleaded for these lands, he ought to vouch the warrantor, in which case he will recover according to the value of the lands which the warrantor had at the time of the *warrantia chartæ* brought (*a*), or, if impleaded in an action in which he cannot vouch, as in assise, he ought, it seems, to give notice to his warrantor, and inquire what defence he shall make. (*b*)

If the party who has the warranty, suffers himself to be impleaded without either vouching or bringing his writ of *warrantia chartæ*, and loses, and execution is sued, he seems to have lost all remedy, for *warrantia chartæ* does not lie unless the plaintiff was tenant the day of the writ purchased. (*c*)

No one, it is said, can have *warrantia chartæ*, but the tenant in demesne (*d*), but this rule must be taken with some qualification. (*e*) If the tenant is *in* of another estate than that to which the warranty is annexed, this writ does not lie. (*f*)

If a man has several warranties from several persons, he may have several writs of *warrantia chartæ* against them. (*g*)

Though the writ supposes the plaintiff to hold of the defendant, yet this is not material (*h*), and so with regard to the words *unde chartam habet*, notwithstanding which, the plaintiff might have counted and bound the defendant by homage ancestral. (*i*)

The process in *warrantia chartæ* is summons, attachment, and distress infinite, and, if *nihil* be returned, a *capias*. (*k*)

The venue is transitory. (*l*)

(*a*) F. N. B. 134 K. Br. Ab. War. Car. 13.
(*b*) F. N. B. 135 A. Com. Dig. Pleader, (3 N. 5).
(*c*) 2 Rol. Ab. 810, l. 7.
(*d*) 2 Rol. Ab. 810, l. 5.
(*e*) Roll v. Osborn, Hob. 21.
(*f*) F. N. B. 135 G.
(*g*) F. N. B. 135 I.
(*h*) F. N. B. 134 E.
(*i*) Br. Ab. Gen. Brief, 8. F. N. B. 134 F.
(*k*) Booth, 241. Com. Dig. Pleader, (3 N. 2).
(*l*) F. N. B. 135 F. Fitz. Ab. Gar. de Char. 14.

Of the Writ of Curia claudenda.

Of *curia claudenda.*

A WRIT of *curia claudenda* lies for the tenant of the freehold against another tenant of the freehold of land adjoining, who will not enclose his land as he ought (*a*), and it lies for not enclosing land in an open field as well as for not enclosing a curtilage, garden, &c. (*b*) A *curia claudenda* does not lie for any one who has not a freehold (*c*), nor for a commoner (*d*), nor against any one whose land does not adjoin the plaintiffs. (*e*)

The writ may be brought either in the county court or in the Common Pleas. (*f*) The process is summons, attachment, and distress. (*g*) If the defendant appears, the plaintiff in his count must shew the certainty of the land, and the adjoining land of the defendant, and must allege, that the defendant is bound to enclose by prescription. (*h*) This action is now superseded by the action on the case. (*i*)

(*a*) F. N. B. 127 H. Com. Dig. *Droit*, (M. 1). Booth, 242. Rast. Ent. 141. Vin. Ab. Fences, (D).
(*b*) Moor, 32.
(*c*) F. N. B. 128 B, who has not a fee, Starr v. Rooksby, 1 Salk. 336.
(*d*) F. N. B. 128 C.
(*e*) F. N. B. 128 B.
(*f*) F. N. B. 127 G, H.
(*g*) F. N. B. 128 D.
(*h*) F. N. B. 128 E.
(*i*) Starr v. Rooksby, 1 Salk. 336.

Of the Writs of Per Quæ servitia, &c.

Per quæ servitia.

Quem redditum reddit.

Quid juris clamat.

Before the statutes 4 and 5 Anne, c. 16, and 11 Geo. 2, c. 19, which have rendered attornment both unnecessary and inoperative (*a*), there were several writs to compel attornment in certain cases. These were the writs of *per quæ servitia, quem redditum reddit,* and *quid juris clamat.* The first lay for the conusee in a fine, to whom a lord had granted a seignory (*b*); the second for the grantee by fine of a rent, to compel the tenant of the land, out of which the rent issues, to attorn (*c*), and the third for the grantee by fine of a reversion or remainder, to enforce the attornment of the tenant for life. (*d*) Even before the statutes which have taken away attornment, these writs were obsolete in cases where fines were levied to uses, when it was held, that the conusees might bring actions, and distrain without attornment. (*e*)

(*a*) See Mr. Butler's Note to Co. Litt. 309, a. (1).

(*b*) Prest. Shep. Touch. 255. Co. Litt. 252, a. Booth, 249. Com. Dig. Fine, (F).

(*c*) Shep. Touch. 285.

(*d*) Shep. Touch. 255. Co. Litt. 320, a, b. F. N. B. 147 A. Vin. Ab. *Quid juris clamat.* Com. Dig. Fine, (F).

(*e*) Sir Moyle Finche's Case, 6 Rep. 68, a. Co. Litt. 309, b. Booth, 250.

Of Summons.

THE process in real actions, to compel the tenant or defendant to appear, is of various kinds, according to the nature of the particular action. It is either, 1. Summons and grand cape, as generally in every *præcipe quod reddat;* 2. Summons, attachment, and distress infinite, as generally in every *præcipe quod faciat*, or action in the realty; 3. Summons and re-summons, as in an assise of *mortd'ancestor*, *juris utrum*, and *darrein presentment;* or, 4. Attachment, as in an assise of novel disseisin and nuisance. (*a*)

The first process to bring the tenant or defendant into court in all real actions, with one or two exceptions, as in assise of novel disseisin, and writ of deceit, is a summons, commanding the sheriff to summon the tenant to appear in court, according to the requisition of the writ. This command is contained in the original writ, and no separate writ of summons issues to the sheriff. (*b*)

Modern practice.

It is said by Booth, that when real actions were in ordinary use, the summoners were persons who were actually employed by the sheriff for that purpose, and whose names were returned; whereas, generally, in his time, no actual summons was really given, but the names of the summoners were returned on the writ, as a matter of course, by the sheriff, but he adds, that if the tenant should come in and wage his law of non-summons, such summons of course would not support the writ. (*c*) It is likewise stated by Mr. Serjeant Williams, that the summons ought regularly to be upon the land, but that in truth no actual summons is made in any real action, though the names of summoners are of course returned by the sheriff upon the writ; but, he observes, that unless the summons be served fifteen days before the return day of the writ, the tenant may wage his law of non-summons. (*d*) The practice, as stated above, is open to great objection, for, if the summons be denied, the sheriff must

(*a*) Finch's Law, 343, 4, 5. Booth, 7. Com. Dig. Process, and see Vin. Ab. Summons.

(*b*) Com. Dig. Process, (D 1). Booth, 4. Gilb. Hist. C. P. 10.

(*c*) Booth, 5.

(*d*) Notes to 2 Saund. 45 c.

prove it (*a*), and, for that purpose, ought to be prepared with the testimony of two persons at least, who have summoned the tenant. (*b*) There are several modes of taking advantage of a non-summons at the present day. The tenant, though such a proceeding has been long disused, may, if he pleases, wage his law of non-summons, and, if he succeeds, the writ will abate (*c*); or, as it seems, the courts would set aside a judgment by default obtained under such circumstances, on an affidavit of the fact of non-summons (*d*); or the tenant may have a writ of deceit, and recover the land (*e*); or an action on the case against the sheriff for his false return. (*f*) The law will not suffer the tenant to lose his lands, unless he has received legal and formal notice of the demandant's claim.

Fifteen days between summons and return.

At common law there must be fifteen days at least between the summons and the day on which the tenant is to appear and answer; and the statute of *articuli super chartas*, 18 Ed. 1, c. 15, which directs, that in summons and attachment in pleas of land, the summons and attachment shall contain the term of fifteen days, is only in affirmance of the common law. (*g*) Fifteen days, according to Sir Edward Coke, were accounted a reasonable time, because a *dieta* or day's journey being twenty miles, that space of time was sufficient to enable the person summoned to make his appearance in court on the day given, in whatever part of England he might reside. (*h*) The summons must be served fifteen days before the return day, and not merely fifteen days before the *quarto die post*. (*i*)

Sheriff's warrant.

Upon the receipt of the writ, the sheriff must make his warrant to his bailiffs, who ought to be two in number at least, and *liberi et legales homines*, so that they may give evidence of the fact of the summons, if it be denied. (*k*) The due service of the summons must be proved by the summoners, and, when a trial is by witnesses, the affirmative must be proved by two or three witnesses. (*l*) The warrant directs the bailiffs to command the tenant to render (*m*) the land, as in the writ, and, unless he shall

(*a*) Com. Dig. Process, (D 3).
(*b*) See *post*.
(*c*) See *post*.
(*d*) Searle v. Long, 1 Mod. 218.
(*e*) See *ante*, p. 136.
(*f*) Dalt. Sh. 100, b. Jenk. Cent. 27.
(*g*) Bract. 334. Fleta, l. 6, c. 6, s. 11. 2 Inst. 567.
(*h*) 2 Inst. 567.
(*i*) Br. Ab. Leygager, 57. Booth, 24.
(*k*) Fleta, l. 6, c. 6, s. 9. 2 Rol. Ab. 488, l. 5. Dalt. Sh. 61. Booth, 4. 1 Reeves' Hist. 403.
(*l*) Co. Litt. 6, b, but see Shotter v. Friend, Carth. 144.
(*m*) By this is meant a render in court, and not in *pais*, Beecher's Case, 8 Rep. 61, b. Keilw. 116, b. Booth, 7.

do so, to summon him to appear at the return of the writ, and it further directs the bailiffs, after summons made, to make proclamation according to the form of the statute. (*a*) On receiving the warrant, the bailiffs must prepare a summons, which pursues the form of the warrant, and must serve it on the tenant of the land. (*b*)

Upon the land.

It is said, that in all actions for the recovery of land, the summons ought to be *in terrâ petitâ* (*c*), but, if the tenant appear, it is immaterial in what land he was summoned. (*d*) Summons upon the land in demand seems to be sufficient, whether the tenant or any one for him be there or not (*e*), and a prayee in aid may be summoned in the land demanded, although it is not his freehold. (*f*) In *quare impedit* it is said, the summons may be either at the church-door, or to the person of the defendant. (*g*) Where the lands lie in several towns in one county, it seems that summons in one town is sufficient. (*h*) The summons ought to be served before sun-set. (*i*)

To avoid all objections, it may be prudent, in summoning the tenant in a real action, to serve him personally with the summons on the land demanded, or, if he be not met with upon the land, to summon him personally, and also to make summons upon the land, by erecting a stick or wand, and affixing to it a copy of the summons (*k*), and it will be proper to read over the summons to the tenant, on serving him with the copy, for the summoners ought properly to name the demandant, the land in demand, and the day of the return. (*l*)

Proclamation.

For the purpose of avoiding secret summonses, and in order to give convenient notice to the tenants of the lands, it is enacted by the 31 Eliz. c. 3, s. 2, that after every summons upon the land in any real action, fourteen days at the least before the day of the return thereof, proclamations of the summons shall be made, on a Sunday immediately after divine service and sermon, if any

(*a*) See the form in 2 Saund. 43, a, note.

(*b*) See the form in 2 Saund. 43, a, note.

(*c*) Com. Dig. Process, (D. 3). Vin. Ab. Summons, (B). Finch's Law, 344.

(*d*) Finch's Law, 344. Dalt. Sh. 61, b.

(*e*) 2 Inst. 253. *Arg.* Perkins v. Lambe, 3 Lev. 409. 2 Saund. 43, a, (note).

(*f*) Br. Ab. Summons *in terrâ*, 16. 2 Rol. Ab. 487, l. 17.

(*g*) 1 Brownl. 158. Booth, 226, but see 2 Rol. Ab. 486, l. 54.

(*h*) Allen v. Walter, Hob. 133.

(*i*) Green v. Arderne, Cro. Eliz. 42.

(*k*) See 3 Bl. Com. 279.

(*l*) Dalt. Sheriff, 61, b. and see the directions given in 3 Chitty's Pl. 624, 5.

sermon there be, and, if no sermon there be, then forthwith after divine service, at or near to the most usual door of the churches or chapel of that town or parish, where the land whereupon the summons was made doth lie, and proclamation so made as aforesaid shall be returned, together with the names of the summoners; and if such summons shall not be proclaimed according to the tenor and meaning of this act, then no grand cape to be awarded, but alias and pluries summons, as the case shall require, until a summons and proclamation shall be duly made and returned according to the meaning of this act.

If there be no church in the parish, it is said that the summons at common law is sufficient; and so also when there is no sermon or prayers between the delivery of the writ to the sheriff and the return (*a*); and if the parish extend into two counties, and the land lies in one county and the church in the other, the proclamation should be made in that church by the sheriff of the county in which the land lies. (*b*) It must appear on the return, that the land lies in the parish in which the proclamation of the summons has been made, and that the proclamation was made after the summons. (*c*) If the lands lie in several parishes or townships, it seems that a proclamation made at the door of the church or chapel of one parish or township is sufficient within the act. (*d*) A return that the sheriff has proclaimed "the contents of the writ" is insufficient, because he must proclaim that he made summons of the land. (*e*) According to modern practice it seems sufficient to return that the sheriff has made proclamation of the said summons, according to the form of the statute. (*f*) If the sheriff returns the tenant summoned at the church door, when in fact he was not so summoned, it is not error. (*g*) The mode of taking advantage of such an irregularity, is by moving to set aside the grand cape or the judgment by default.

Sheriff's Return.

When the summons has been served, which, as above stated, must be at least fifteen days before the return of the writ, the sheriff returns the writ with the names of the pledges and summoners endorsed; and that he has made proclamation of the

(*a*) Anon. Anders. 278. Vin. ab. Summons, (C. 3).

(*b*) *Ibid.* Ragster's Case, Cro. Eliz. 472.

(*c*) Furnis v. Waterhouse, 1 Mod. 197.

(*d*) Allen v. Walter, Hob. 133. 1 Brownl. 126, S. C.

(*e*) *Ibid.*

(*f*) *Ibid.* 2 Saund. 43, b, note.

(*g*) Collett v. March, Cro. Eliz. 371, 397. Moor, 349, S. C.

summons, according to the form of the statute.(*a*) The sheriff, by alleging some special cause, may excuse himself for not having summoned the tenant, as formerly, on account of the plaintiff not having given pledges(*b*); or he may return *tardè*, that is to say, that the writ was delivered to him so late, that he could not serve it according to the exigency(*c*); or that no one came to shew the land to him.(*d*) It is not a good return to say that the tenant has yielded the lands.(*e*)

Alias Summons. If for any of these causes the summons has not been served, or if it appear on the return, that proclamation has not been made, according to the statute 31 Eliz. c. 3, the demandant may sue out an alias summons(*f*); and if the tenant be not summoned on the alias, he may wage his law of non-summons(*g*), and if he has been essoigned on the first summons, which was returned *tardè*, he may still be essoigned on the alias, for the first essoign was void.(*h*)

(*a*) 2 Saund. 43, a, note.
(*b*) Booth, 6. Off. Br. 357.
(*c*) Dalt. Sh. 107, a. Off. Br. 358, 361.
(*d*) Off. Br. 358, 9.
(*e*) Dalt. Sh. 100, b. Br. Ab. Retorn. 84. *Ante*, p. 47, note.
(*f*) Booth, 6. Off. Br. 357, 361.
(*g*) Br. Ab. Ley Gayger, 103.
(*h*) Com. Dig. Exoine (D), and see *post* in "Essoign."

Of Attachment.

In many writs, in the realty, which are not properly for demand of land, as in waste, *quod permittat, secta ad molendinum, &c.* (*a*) the process is by summons, attachment, and distress infinite. (*b*)

If the defendant in such writs make default at the return of the summons, then, in order to compel an appearance, a writ of attachment issues, by which the sheriff is commanded to put by gages and safe pledges the defendant, that he be before the justices, &c. on such a day, to answer the plaintiff of such a plea.

If the defendant appears at the return of the summons, and casts an essoign, an attachment may issue, if he fails to appear on the day to which the essoign is adjourned, and the writ then runs "to answer, &c." and also, "to shew wherefore he has not kept the day given him by the essoign, &c." (*c*)

Formerly, the practice was for the sheriff on the receipt of the writ to proceed, and attach the defendant, which he ought either to do by attaching his goods (*d*), or by compelling him to find pledges for his appearance (*e*); or, as it seems by merely summoning him to appear, without attaching him either by pledges or goods. (*f*) If the sheriff attached goods, he did not return pledges. (*g*)

Under the writ of attachment, the sheriff could only take the moveable goods of the defendant, and not a chattel real, or a thing fixed to the freehold, nor the horse upon which he was riding, nor the apparel with which he was clothed. (*h*) And the sheriff ought to have returned the particular goods seized, and not "chattels to the value of 10*l.*;" for if the defendant does not

(*a*) The nature of the process is specified under the head of each writ, *ante*.

(*b*) Com. Dig. Process, (D. 6). Booth, 8.

(*c*) Rast. Ent. 520, b.

(*d*) Dalt. Sheriff, 62, b. Com. Dig. Process, (D. 6). Booth, 9.

(*e*) *Ibid.*

(*f*) *Ibid.* Br. Ab. Attach. 9. 1 Tidd's Pr. 126 (7th edit.).

(*g*) Com. Dig. Process, (D. 6).

(*h*) Com. Dig. *ut sup.* Vin. Ab. Attachm. (B.)(C.) 2 Inst. 254.

appear, the goods attached are forfeited (*a*); and he ought not to have taken goods of great value, but a single thing sufficient to make the defendant appear. (*b*) A clerk was to be attached by his person or his lands, if he had a lay fee, and not by his goods. (*c*)

If the defendant was attached by pledges, and did not appear, a *distringas* issued, and the pledges were amerced. When the pledges became merely nominal, the amercement was entered of course. (*d*)

There are some actions in the realty, in which attachment is the first proceeding, as in an assise of novel disseisin or nuisance (*e*), and in a writ of deceit. (*f*)

In general there must be fifteen days between the teste and the return of the attachment: except in assise in the King's Bench, Common Pleas, or before justices in eyre, but it is otherwise in an assise before justices of assise (*g*); and also, except in some particular jurisdictions, where the process by custom or by act of parliament is returnable *de die in diem*. If there had not been fifteen days between the teste and return of the writ, the defendant in assise, before justices of assise, might have pleaded *not attached by fifteen days*, which was equivalent to waging law of non-summons in other actions, and was tried by examination of the bailiff or officer who made the return. (*h*)

By statute 51 G. 3, c. 124, (continued by 57 G. 3, c. 101,) the method of procuring an appearance in actions, in which the process is summons, attachment, and distress, is much facilitated; and now in all cases where the plaintiff or plaintiffs shall proceed by original or other writ, and summons or attachment thereupon, in any action against any person or persons not having privilege of parliament, no writ of *distringas* shall issue for default of appearance; but the defendant or defendants shall be served personally with the summons or attachment, at the foot of which

(*a*) Lawrence v. Netherall, Cro. Eliz. 13. Dyer, 199, a. S. C. Wells v. Wigon, Carter, 224, and see Kitch. on Courts, 157.

(*b*) 2 Lutw. 1457.

(*c*) Fitz. Ab. Retorn, 23. Com. Dig. Process, (D. 6).

(*d*) Booth, 10.

(*e*) Com. Dig. Process, (D. 6).

(*f*) F.N. B. 100 D. but in deceit for non-summons, the process appears to be a *venire facias*, in nature of a summons, Booth, 252. Hale's note, F.N.B. 97 C. (b).

(*g*) St. Art. sup. Ch. c. 15. 2 Inst. 568. Co. Litt. 134, b.

(*h*) Br. Ab. Attach. in Ass. 1. &c. Vin. Ab. Assise, (W). Booth, 9. Case of Abbot of Strata Marcella, 9 Rep. 31, b.

shall be written a notice, informing the defendant or defendants of the intent and meaning of such service. (*a*)

But in case it shall be made to appear to the satisfaction of the court, or in the vacation, of any judge of the court from which such process shall issue, or into which the same shall be returnable, that the defendant or defendants could not be personally served with such summons or attachment, and that such process had been duly executed at the dwelling-house or place of abode of such defendant or defendants, that then it shall and may be lawful for the plaintiff or plaintiffs, by leave of the court, or order of such judge as aforesaid, to sue out a writ of *distringas*, to compel the appearance of such defendant or defendants, and that at the time of the execution of such writ of *distringas*, there shall be served on the defendant or defendants, by the officer executing such writ, if he, she, or they can then be met with, or if he, she, or they cannot then be met with, there shall be left at his, her, or their dwelling house, or other place where such *distringas* shall be executed, a written notice (informing the defendant of the meaning of the service.) (*b*)

And if such defendant or defendants shall not appear at the return of such original or other writ, or of such *distringas* as the case may be, or within eight days after the return thereof, in such case it shall and may be lawful to and for the plaintiff or plaintiffs, upon affidavit being made, and filed in the proper court, of the personal service of such summons or attachment, and notice written at the foot thereof as aforesaid, or of the due execution of such *distringas*, and of the service of such notice as is thereby directed on the execution of such *distringas*, as the case may be, to enter a common appearance for the defendant or defendants, and to proceed thereon, as if such defendant or defendants had entered his, her, or their appearance. (*c*)

(*a*) See the form of notice in the act and in 1 Tidd's Pr. 110 (8th edit.).

(*b*) See the form in the act, and in 1 Tidd's Pr. 111.

(*c*) For forms of affidavits and returns on this stat. see Tidd's Pr. Forms, c. iv. s. 20, 1, 2, 3, 4, 5, and see 1 Tidd's Pr. 111 (8th edit.).

Of Distress.

In those actions in the realty, in which land is not exclusively and properly the subject of the demand, the process, as we have seen, is in general summons, attachment, and distress. (*a*) Formerly if the defendant neglected to appear on the return of the attachment, a *distringas* issued against him, in order to compel such appearance, and by the statute of Westminster, c. 45, it was enacted, that if the tenant after the first attachment returned, make default, the grand distress shall be awarded. (*b*) The grand distress, or distress infinite, is a process to compel the defendant, by repeated distresses, to appear to the action, but by a late statute, the method of procuring an appearance in actions where the process is summons, attachment, and distress, is, as we have seen, much facilitated. (*c*)

Ancient practice.

Before this statute the plaintiff had no means of proceeding in the suit (*d*), if the defendant, notwithstanding the repeated distresses, still refused to appear, except in certain actions which were specially provided for by statute, and in which, upon the defendant's neglect to appear on the return of the *distringas*, judgment was given against him. By the statute of Marlbridge, c. 7, in a writ of ward, in which the process was summons, attachment, and distress infinite, a proclamation is directed to be made, and if the defendant still neglects to appear, judgment may be given against him. (*e*) And by the statute of Westminster 2, c. 14, in a writ of waste, if the tenant make default at the return of the *distringas*, a writ of inquiry of the waste done may

(*a*) *Ante*, p. 146.

(*b*) 2 Inst. 254.

(*c*) See *ante*, p. 152.

(*d*) Booth indeed appears to think that the statute of West. 2, c. 45, which directs the grand distress to issue, entitles the plaintiff, on the tenant's default, at the return of that writ, to judgment, as in the case of a grand cape, Booth, 11, 12, 13; and such appears to be the opinion of C. B. Comyns, Digest, Process, (D. 7.) and see 2 Inst. 255, where Sir E. Coke upon the words of the statute of West. 2, c. 45. "and if he come not" (that is at the return of the *distringas*) observes "for then judgment is to be given against the defendant."

(*e*) 2 Inst. 113. and see the alteration made by stat. W. 2, c. 35. 2 Inst. 442. and see as to the process in a writ of mesne stat. W. 2, c. 9. 2 Inst. 374. Dr. Foster's Case, 11 Rep. 64, a.

issue, upon the return of which, judgment may be given (*a*); and so in a *quare impedit*, by the statute of Marlbridge, c. 12, if the tenant make default at the return of the *distringas*, a writ shall go to the bishop. (*b*) The distress in these cases is sometimes called distress peremptory; and it is to be observed, that if the defendant appears upon the return of the *distringas*, and afterwards makes default, the plaintiff is not entitled to judgment by these statutes, but must issue a fresh *distringas*. (*c*) It is apprehended that the statute 57 Geo. 3, c. 101, does not operate to prevent the plaintiff from issuing a *distringas*, and availing himself of the statutes referred to above.

A *distringas* also lies at common law upon a default *after* appearance in actions in which the process to compel appearance is summons, attachment, and distress (*d*), and it is then said to be in lieu of a petit cape; and if the defendant again makes default on the return of the *distringas*, it seems that the plaintiff, in analogy to the case of an action strictly real, is entitled to judgment (*e*), and if the defendant should make default in the term of his appearance, it will be a departure in despite of the court, and the plaintiff will be entitled to judgment without further process. (*f*) For default after appearance.

The form of the *distringas*, when it issues before appearance, is that the sheriff distrain the defendant to appear "to answer the said A. B. of a plea, &c." (according to the cause of action). When it issues in lieu of a grand cape, the following words are added, "and also to hear judgment of many defaults;" and when the *distringas* issues in lieu of a petit cape, the first clause "to answer &c." is omitted. (*g*)

The return of the sheriff is, that he has distrained the defendant by his lands and chattels, to which he adds the amount of the issues and the names of the manucaptors. (*h*) Sheriff's return.

(*a*) 2 Inst. 389. 1 Brownl. 237. *Ante*, p. 124.

(*b*) 2 Inst. 124. 1 Brownl. 158. Off. Br. 64, and see *post*, as to the necessity of counting before judgment.

(*c*) 2 Inst. 125.

(*d*) 2 Inst. 254. Com. Dig. Process, (D. 7).

(*e*) 2 Inst. 254. Fitz. Ab. Judgm. 130. Booth, 13; though the defendant may save his default, Fitz. Ab. Process, 28. F. N. B. 123 D.

(*f*) William v. Gwyn, 2 Saund. 46, a.

(*g*) Booth, 11, the same distinction exists between the grand and petit cape.

(*h*) Booth, 12. Dalt. Sh. 85, b.

Of Essoigns.

An essoign signifies an excuse for not appearing at the return of process, and in most real actions it lies either for the demandant or the tenant. Essoigns are of five kinds. 1. *De servitio regis.* 2. *In terram sanctam.* 3. *Ultra mare.* 4. *De malo lecti.* 5. *De malo veniendi*, or the common essoign. In all, except the last, the demandant is delayed a year and a day. (*a*)

At common law, in order to prevent essoigns from being used as a means of delay, the person casting the essoign was required to swear that the cause of the essoign was just and true, but by the statute of Marlbridge it was enacted that none need to swear to warrant his essoign. Although this act speaks of essoigns generally, yet it has been held only to apply to the common essoign *de malo veniendi*. (*b*) As all the other essoigns have been long obsolete, it will be sufficient to notice the practice concerning them in a very cursory manner.

Who may have an essoign. Essoign for the party himself.

With the exceptions which will be afterwards noticed, both the demandant and tenant are allowed at common law to be essoigned. (*c*) As an essoign is only an excuse for not appearing, if the party who is desirous of being essoigned has appointed an attorney in the cause, there is no ground for excusing his delay, as the attorney is competent to carry on the proceedings. On this account it is a good cause of challenge to an essoign to say that the party has an attorney upon the record. (*d*) In casting a common essoign, the name of the essoignor, or the person who casts it, ought not to be entered (*e*), and if the essoign appears to be cast by the attorney of the party, it is bad (*f*). But

(*a*) Viner Ab. Essoign. Com. Dig. Exoine. Spelm. *voc*, *Essoniare*. 2 Inst. 125, 137.

(*b*) 2 Inst. 137.

(*c*) 2 Inst. 125.

(*d*) 12 Ed. 2, stat. 2, sec. 12. 1 Rol. Ab. 825, l. 47. Slay's case cited 1 Ld. Raym. 80. Carth. 45.

(*e*) 1 Rol. Ab. 821, l. 11.

(*f*) Anson v. Jefferson, 2 Wils. 164. It should be observed, that in this case it did not appear *on the record* that Henzell and Lodge who cast the essoign were the defendant's *attornies*. The entry was "essoign for John Jefferson, at the suit of Anson, by Henzel and Lodge." That fact appeared on affidavit, therefore quære.

where the party has appointed an attorney, who has been subsequently removed, there an essoign will lie.(*a*) Upon the same ground, an essoign cannot be cast by the party in person, which would be clearly absurd(*b*); and in a writ against several, the plaintiff cannot be essoigned as against one, and appear by attorney against another.(*c*)

Essoign for the attorney.

As either of the parties to the suit may excuse himself from appearing, if he has not appointed an attorney to appear for him, so the attorney, when appointed, may, for the same reasons, essoign himself; for the causes which prevented the party himself from appearing, may also prevent the attorney.(*d*) This essoign has been long disused, but if it is thought expedient to cast an essoign after a man has appeared by attorney, either this mode must be resorted to, or the attorney must be removed. The attorney can only essoign himself by the common essoign.(*e*)

The vouchee on the return of the summons *ad warrantizandum*, and the prayee in aid, on the return of the summons *ad auxiliandum*, may have an essoign.(*f*)

A corporation aggregate cannot have an essoign *de malo veniendi*, for they cannot come in their proper persons, nor can they be sick(*g*), nor can they have any other essoign.(*h*)

In what actions essoign lies.

Regularly an essoign lies in all real and mixed actions.(*i*)

It is said, that at common law, neither the plaintiff nor the tenant in an assise of novel disseisin was allowed an essoign, because in that action delays are discountenanced(*k*); but it appears from Bracton, that this disability was only confined to the tenant(*l*), and to the same effect is the rule given by Sir Edward Coke, *locum non habet essonium in personâ disseisitoris vel redisseisitoris*(*m*), though he adds, that it is said, that the justices of the King's Bench will not allow an essoign for the plaintiff in any manner of assise.(*n*) However, if the assise be discontinu-

(*a*) Y. B. 19 H. 6, 51. Chetham v. Sleigh, Carth. 45.

(*b*) 1 Rol. Ab. 821, l. 25.

(*c*) 1 Rol. Ab. 820, l. 21. Br. Ess. 56.

(*d*) 1 Rol. Ab. 818, l. 22. Br. Essoign, 129; but quære, whether both the party and the attorney ought to be essoigned. It seems not, Earl of Clanrickard v. L. Lisle, Hob. 46, 47.

(*e*) 2 Inst. 394.

(*f*) Com. Dig. Exoine, (B. 2).

(*g*) Br. Corp. 28. 1 Rol. Ab. 818. l. 4. Bendl. 121. Argent v. Dean and Chap. of St. Paul's, 16 East, 8, (note).

(*h*) Br. Essoign, 114.

(*i*) Com. Dig. Ex. (B. 1.)

(*k*) Com. Dig. Exoine, (C).

(*l*) Bract. 182, a, and see Br. Ab. Essoin, 100.

(*m*) 2 Inst. 249. Jehu Webb's case, 8 Rep. 50, a.

(*n*) And see 22 Ass. 79.

ed by the *non venue* of the justices, on a re-attachment issued, the tenant may be essoigned. (*a*)

In an assise of *mortd'ancestor*, *juris utrum*, and attaint, neither the tenant, by stat. Westminster 1, (*b*); nor the demandant, by stat. Westminster 2, (*c*) shall be essoigned, after he has once appeared in court; indeed it seems that no essoign lies for the tenant in *mortd'ancestor*. (*d*) These statutes do not apply to the assise of novel disseisin, nor to any other than the common essoign. Tenants in law as the vouchee, and the tenant by receit are within them. (*e*) The tenant in *mortd'ancestor* after a discontinuance may however be essoigned. (*f*)

The common essoign lies in a writ of dower, for the statute 12 Edw. 2, which enacts that an essoign shall not lie in a writ of dower, is to be understood of an essoign *de servitio regis*. (*g*)

No essoign lies in judicial writs (*h*) as in *scire facias* (*i*), and grand or petit cape (*k*); but when the tenant wages his law on the return of the grand cape, and a day is given him to make his law, on the latter day he may be essoigned. (*l*)

No essoign *de servitio regis* is allowed in dower, *quare impedit*, *darrein presentment*, or novel disseisin, because the law discountenances great delays in those actions (*m*); but the common essoign lies in *quare impedit*, for the defendant as well as the plaintiff. (*n*)

At what period of the proceedings essoign lies.

At common law, whenever a person ought to appear in court upon the return of process, he might excuse himself from appearing on that day, by causing himself to be essoigned, but as this practice was used in many instances as a means of delay, it has been restrained in various cases by statute.

In general, however, an essoign may be cast at every day of appearance; before appearance, or afterwards before plea; before issue, or afterwards, upon the return of the *venire facias*, (*o*)

(*a*) 2 Inst. 249.

(*b*) Stat. Wcst. 1, c. 42. 2 Inst. 249.

(*c*) Stat. West. 2, c. 28. 2 Inst. 418.

(*d*) 1 Rol. Ab. 822, l. 46. Br. Essoign, 94; but see Glanville, l. 13, c. 7.

(*e*) 2 Inst. 249, 418.

(*f*) *Ibid.* but see 12 Ed. 2, st. 2, s. 13. *post*.

(*g*) 1 Rol. Ab. 822, l. 22. Bedingfield's Case, 9 Rep. 15, b. But see Hickson v. Hickson, Hatt. 69.

(*h*) 1 Rol. Ab. 822, l. 25.

(*i*) West. 2, c. 45. 2 Inst. 469. Br. Essoign, 120.

(*k*) 12 Ed. 2, c. 2, s. 1. Com. Dig. Exoine, (C).

(*l*) Com. Dig. Abatem. (H. 53,) and vide in "Saver default," *post*.

(*m*) 2 Inst. 124.

(*n*) Rast. Ent. 520. 2 Mall. Quar. Imp. 193. 1 Brownl. 159. 2 Inst. 125.

(*o*) Com. Dig. Exoine, (B 3).

and where the tenant is essoigned on the return of the *venire facias*, the *habeas corpora juratorum* shall be made returnable on the adjournment day of the essoign. (*a*) In real actions, it seems, that an essoign may also be cast on the return of the *habeas corpora*, for the stat. of West. 2, c. 27, relates only to personal actions. (*b*) Essoign lies after aid-prayer for the prayee in aid, at the return of the *summoneas ad auxiliandum*, and also after view. (*c*)

The vouchee may be essoigned on the day of the return of the *summoneas ad warr.* (*d*), and, at the adjournment day of this essoign, the tenant may be essoigned, but the latter cannot be essoigned after the vouchee has entered into the warranty. (*e*)

A common essoign does not lie immediately after another common essoign, nor after an essoign *de servitio regis* (*f*); but after intermediate process, a man may be again essoigned. (*g*) After a grand or petit cape, as we have seen, the tenant cannot be essoigned by the common essoign (*h*), because the tenant ought to answer the default in the first instance, but he may have an essoign *de servitio regis*. Where the writ is returned *tardè*, that is, where the sheriff returns, that he received it too late to execute it before the return, the tenant has no day in court, for he was never summoned, and cannot therefore be essoigned (*i*), nor can one who is neither party nor privy to the writ be essoigned; thus, if he in reversion prays to be received for default of the lessee, and the receit is counterpleaded, he cannot be essoigned before the counterplea is tried, for he is not a party before (*k*), but after receit he may be essoigned. (*l*)

Where essoigns are restrained by statute.

The first statute by which the practice of essoigning was restrained, is the statute of Marlbridge, 52 Hen. 3, c. 13, by which it is enacted, that after a man has put himself upon an inquest he shall have but one essoign or one default, so that if he come not at the day given him by the essoign, or make default the second day, the inquest shall be taken by his default. This

(*a*) Br. Essoign, 137.
(*b*) Booth, 63. 2 Inst. 417, but see Com. Dig. Exoine, (B 3,) *contra*.
(*c*) Vide in "View," *post*.
(*d*) 1 Rol. Ab. 824, l. 24.
(*e*) Clanrickard v. Lisle, Hob. 46. 1 Rol. Ab. 819, l. 25.
(*f*) 1 Rol. Ab. 824, l. 51, 825, l. 1.
(*g*) *Ib.* 825, l. 7.
(*h*) 12 Ed. 2, Sess. 2.
(*i*) 1 Rol. Ab. 824, l. 27. Vernon v. Vernon, Dyer, 252, a; but it seems, that the plaintiff may be essoigned, 1 Rol. Ab. 820, l. 32. Br. Essoign, 92, *quære*.
(*k*) 1 Rol. Ab. 824, l. 18. Br. Essoign, 68, and see Co. Litt. 130, b.
(*l*) 1 Rol. Ab. 824, l. 21.

statute, however, only extends to personal actions. (*a*) The statute of Westminster 2, 13 Ed. 1, c. 27, enacts that the one essoign, to which the defendant was limited by the statute of Marlbridge, should be cast at the next day, that is at the return of the *venire facias*. But this statute, as well as the above, only relates to personal actions. (*b*)

The statutes of 3 Ed. 1, c. 42, and 13 Ed. 1, c. 28, taking away the essoign, both of the tenant and demandant, after appearance, in writs of assise, attaints, and *juris utrum*, have been already noticed. (*c*)

By statute of Westminster 1, 3 Ed. 1, c. 43, it is enacted, that parceners or tenants jointly enfeoffed shall not fourch by essoign, and shall have but one essoign. Fourching by essoign was, where there were several jointenants, or coparceners, and a *præcipe* was brought against them, and they delayed the demandant, by alternately appearing and essoigning themselves. Where there are several tenants, and one appears and essoigns himself, the essoign is adjourned to a future day, and the same day is given to the other tenants to appear. On this day another tenant may essoign himself, and the essoign is adjourned, and the same day is given to the first tenant, and to the others who have not essoigned themselves. This may be continued, until all the tenants have been essoigned, and yet this is no fourching by essoign. (*d*) But when the first tenant, who has already had one essoign, and has appeared on the adjournment day of that essoign, casts another essoign, on the adjournment day of the essoign by the last tenant, this is fourching by essoign, and within the above statute. (*d*) Demandants are not within it, nor the case of baron and feme, seised in right of the feme, essoigning *vicissim*; the latter evil is remedied by the statute of Gloucester. (*e*) The statute of Westminster 2, c. 43, does not extend to writs of partition. (*f*)

By 12 Ed. 2, statute 2, s. 1 (*g*), it is declared how many ways essoigns may be challenged, and in what cases essoigns lie, and in what not; "that is to say an essoign lies not where the land is taken unto the king's hands. (*h*) 2. Where the party is dis-

(*a*) 2 Inst. 126. Vaughan's case, Godb. 235. Dyer, 324, b.
(*b*) 2 Inst. 417.
(*c*) *Vide ante*, p. 158.
(*d*) 2 Inst. 250. Booth, 16. Bowyer v. Milner, 2 Vent. 57. Hob. 8.
(*e*) 2 Inst. 251, 321. Br. Essoign, 29.
(*f*) Hob. 8.
(*g*) See Vin. Ab. Essoign, (A).
(*h*) That is upon a grand or petit cape.

trained by his lands and chattels. (*a*) 3. Where any judgment is given thereupon. 4. Essoign of *ultra mare* lies not where, another time, a party has been essoigned *de malo veniendi*. 5. It lies not where the party has essoigned himself another day. (*b*) 6. It lies not where the sheriff was commanded to make the party to appear. (*c*) 7. Essoign *de servitio regis* lies not where the party is a woman, unless where she be nurse, a midwife, or commanded by writ *ad ventrem inspiciendum*. 8. It lies not for that the plaintiff has not found pledges to prosecute the suit. 9. It lies not where the party has an attorney in his suit. (*d*) 10. It lies not where the essoigner confesses that he is not in our lord the king's service. 11. It lies not where the summons is not returned, or the party not attached, for that the sheriff has returned *non est inventus*. (*e*) 12. It lies not where the party was essoigned another time, *de servitio regis*, that is to wit such a day, and now he has not put in his warranty. 13. It lies not where he was resummoned in assise of *mortd'ancestor*, or *darrein presentment*. (*f*) 14. It lies not because such a one was not named in the writ. (*g*) 15. It lies not where the sheriff has a precept to distrain the party to come by his land and goods to attach him. (*h*) 16. It lies not where the bishop was commanded to cause the party to appear. 17. And it lies not for that the term is passed. And it is to be noted that an essoign *de servitio domini regis* is allowed after the grand cape, petit cape, and after distresses taken upon the lands and goods."

This statute is mostly a declaration of the common law. (*i*)

The mode of casting an essoign.

The essoign for the demandant, according to some authorities, ought to be cast the first day, that is to say on the return day of the writ, because he is demandable on that day (*k*), but accor-

At what time,

(*a*) Bract. 341, a.

(*b*) This appears only to restrain an essoign, *immediately* after another essoign, for after intermediate process a man may be essoigned again, *ante*, p. 159.

(*c*) This seems to relate to the obsolete mode of serving process, see note (*h*).

(*d*) *Vide ante*, p. 156.

(*e*) *Vide ante*, p. 150.

(*f*) Lort v. Bp. of St. David's, Sir W. Jones, 331.

(*g*) The meaning of this clause appears to be, that an essoign does not lie for a person not named in, or a party to the writ, as one of the jurors, viewers, &c., Bracton, 340, a.

(*h*) This section seems to relate to the antient mode of executing the process of attachment, for it is a general rule, that in a plea depending, an essoign may follow every summons or attachment, Bracton, 341, a. 1 Reeves' Hist. 409. See the mode of serving the attachment in Glanville's time, 1 Reeves' Hist. 121.

(*i*) The translation and original vary in some instances, *vide* Ruffhead's stat. The text is taken from Runnington's edit. *vide* 2 Reeves, 303.

(*k*) Y. B. 12. H. 4, 24, b. 10 H. 6. 3, b. Cloberry v. Bishop of Exon,

ding to others, it may be cast on the fourth day, by assent of the parties, unless an exception be entered. (*a*) The tenant may be essoigned at the fourth day, because he has no occasion to appear before that day (*b*); but unless he cast the essoign on the return day, the demandant may enter a *ne recipiatur* with the clerk of the essoigns on the following day (*c*); after which the tenant will not be permitted to cast an essoign. Should the demandant neglect to enter a *ne recipiatur*, the tenant, as it has been said, may cast an essoign, even on the fourth day; but, if on that day, he neither appears nor casts an essoign, a default will be incurred, upon which a grand cape may issue. (*d*)

The essoign ought to be entered upon a separate roll, called the essoign roll, as well as upon the plea roll. (*e*)

How adjourned. After the essoign is cast, the tenant should give a rule, with the clerk of the essoigns, for the demandant to adjourn the essoign, and unless it be adjourned accordingly, within the time given by the rule, the clerk of the essoigns will sign judgment of *non pros* (*f*), but if the essoign be ill cast, the judgment of *non pros* may be set aside (*g*); as soon as the essoign is adjourned, the parties are out of court, and their appearance cannot be recorded until the adjournment day. (*h*)

By statute 24 Geo. 2, c. 48, s. 3, the essoign must be adjourned by the demandant to the fourth return, both inclusive; and when an essoign is cast, *idem dies*, (that is, the adjournment day,) is given upon the roll to the other party, and the omission of it is error (*i*), but it is said that *idem dies* can only be given to the other parties in case they appear (*k*).

Challenge. If an essoign be cast where no essoign lies, it may be challenged, that is the other party may allege cause to shew that an

Carth. 172. Br. Default, 23. 1 Rol. Ab. 823, l. 50.

(*a*) Y. B. 18. Ed. 4, 4, b. Br. Essoign, 112. 1 Rol. Ab. 824, l. 1, but *quære* whether the case in the Y. B. does not relate to essoign by tenant only.

(*b*) 1 Rol. Ab. 824, l. 3.

(*c*) Gilb. C. P. 13.

(*d*) But *quære* Serg. Williams's note, 2 Saund. 45, f, as to entering an essoign at any time before a *ne recipiatur*; and see Burghill v. Gibbons, 1. Ld. Raymond, 79, where it is said to be the course of the court that an essoign may be cast at any time before a *ne recipiatur* is entered.

(*e*) See the form, Co. Ent, 266, a. Gilb. Hist. C. P. 13.

(*f*) 1 Ld. Raymond, 79. 1 Rich. C. P. 26. 2 Saund. 45, e, note. Booth, 92.

(*g*) 1 Ld. Raymond, 79.

(*h*) Stokes v. Annesby, Cro. Eliz. 367. Gilb. Hist. C. P. 13.

(*i*) Cloberry v. Bp. of Exon, Carth. 173.

(*k*) Lort v. Bp. of St. David's, Sir W. Jones, 331. *Sed quære* Co. Ent. 330.

essoign ought not to be allowed; still the essoign must be adjourned, or it is error (*a*); for the challenge must be tried at the adjournment day, and not immediately, unless the challenge be because the party essoigning himself was seen in court the same day, in which case it shall be tried immediately, by the view of the party, and the court will record his appearance. The reason why the challenge shall not be tried immediately, is, because the party is absent from court, and the essoigner, who has cast the essoign for him, is no party to the challenge to try it. (*b*)

Judgment upon the Challenge.

Where an essoign is quashed upon trial of the challenge, because the tenant has not appeared, the demandant cannot have immediate judgment of seisin, but must issue a grand cape before, or a petit cape after appearance; but if the tenant demurs to the challenge, and appears at the day of the adjournment of the essoign, to argue the demurrer, and loses, judgment of seisin shall be immediately awarded. (*c*)

When an essoign is denied, where it ought to be granted, it is error, but not *e contra* (*d*); and if there be an entry of the adjournment of the essoign on the plea roll, and judgment at the day given, by default, when no essoign appears upon the essoign roll, it is erroneous. (*e*)

Of the obsolete essoigns.

Although all the essoigns, except the common one, *de malo veniendi*, have long become obsolete, yet it may be proper to state very shortly, the mode in which they ought to be cast.

It has been already said, that in every essoign but the common one, the party essoigning himself must swear to the truth of his excuse. If the tenant essoign himself, *de servitio regis*, he must produce a warrant under the great seal, testifying that he is in the king's service, and this must be done on the day to which the essoign is adjourned, otherwise a default will be incurred upon the essoign day. (*f*) If the demandant is essoigned by this essoign, and does not bring in his warrant on the adjournment day, he is nonsuited. (*g*) This warrant or writ is granted

(*a*) 1 Latw. 862, b. Com. Dig. Essoine, (E).

(*b*) Br. Essoign, 27, 41. 1 Rol. Ab. 525. 1 Latw. 862, b.

(*c*) Chetham v. Sleigh, Carth. 45, 1 Latw. 860, S. C., better reported. It should be observed that where the books speak of judgment *final* or *peremptory* being given, in case of default in real actions, judgment without a grand or petit cape, is all that is intended. See the argument in Lut. 861, b.

(*d*) Hob. 47. Dyer, 26, b. Burghill v. Archbp. of York, 1 Ld. Raym. 79.

(*e*) Dyer, 330, a.

(*f*) 2 Inst. 314. 1 Rol. Ab. 827. 1 Reeves' Hist. 408.

(*g*) 2 Inst. 314.

by the Chancellor, upon a certificate of the captain, (or commander of the forces) under whom the person essoigning himself serves, and is directed to the justices.(*a*) It is said that as the delay by this essoign (a year and a day) is so great, the essoigner who essoigns the party, must appear in person in court, in order that he may be sworn and have a day given him for bringing in his warrant.(*b*) The name of the person who casts this essoign ought to be entered; and it is not sufficient for him to swear that he is informed that his master is in the king's service, but he must affirm that fact positively (*c*); the essoign may be cast by one who is within age.(*d*)

By the statute of Westminster 1, c. 44, the demandant may challenge the essoign of *ultra mare*; and aver that the tenant was in England the day of the summons, and three weeks after, and at the adjournment day this shall be tried by the country or otherwise, as the court shall award, and if it be found for the demandant, the essoign shall be turned to a default. (*e*)

At common law, if a man was essoigned *de malo lecti*, which only lies in a writ of right (*f*), the adverse party could not take issue on the health or sickness, and try it by a jury, but it was inquired into by four knights returned for that purpose by the sheriff, *si fecerit languidus aut non*, and if they found he was not *languidus*, he had fifteen days given him to appear in, so that there was a delay of fifteen days, in addition to the time lost before. To remedy this inconvenience, the statute of Westminster *2*, c. 17, provided that the party might take issue, that the person essoigning himself was not *languidus*, and that if so found, the essoign should turn to a default. If he was found *languidus* he had a year and a day given him. (*g*) By the same statute it was enacted, that such essoign should not lie in a writ of right, between two claiming by one descent.(*h*)

(*a*) *Ibid.*
(*b*) *Ibid.* Br. Essoign, 44.
(*c*) 1 Rol. Ab. 821, l. 42.
(*d*) 1 Rol. Ab. 821, l. 19. Br. Essoign, 55.
(*e*) 2 Inst. 252.
(*f*) 1 Rol. Ab. 823, l. 1.
(*g*) 2 Inst. 393. 1 Reeves' Hist. 415. Com. Dig. Exoine, (B. 4. E).
(*h*) 1 Rol. Ab. 823, l. 4.

Of the Grand Cape.

If the tenant, having been duly summoned, neglects to appear on the return of the writ, or to cast an essoign, or, in case of an essoign being cast, neglects to appear on the adjournment day of the essoign, the next process for the demandant is a judicial writ of grand cape, so called from the words *cape in manum nostram*, by which the Sheriff is commanded, that he take into the king's hands, by the view of good and lawful men of his county, the lands, &c. for the default of the tenant, and make known the day of the taking to the justices at Westminster; and also that he summon, by good summoners, the tenant, that he be before the justices at Westminster on the return day, to answer to the principal plea, and to shew wherefore he was not before the justices, according to the former summons; or if the default be for not appearing on the adjournment day of the essoign—to shew wherefore he did not keep the day given him by reason of his essoign, before the justices at Westminster, &c., and that the sheriff have there the names of those by whose view he shall do this, of the summoners and the writ. (*a*)

The grand cape must be served at least fifteen days before the return day; it is not sufficient to serve it fifteen days before the *quarto die post* (*b*), and where the writ is general, as in dower, where the demandant only demands her reasonable dower of the freehold, which was of her husband, without specifying the quantity, there must be a demand, in nature of a count, before the grand cape can issue, in order to ascertain the particulars and acres, &c. (*c*)

Duty of the Sheriff.

The duty of the sheriff in executing the writ of grand cape is, first, by the view of honest and lawful men of his county, to seise the tenements into the king's hands, and, secondly, to summon the tenant. For this purpose, the bailiff should take with

(*a*) Br. Ab. Gr. Cape, 3, &c. 2 Saund. 45, c, note. Booth, 20. Bracton, 365, a. Gilb. Hist. C. P. 11. Com. Dig. Pleader, (B. 10).

(*b*) Br. Ab. Gr. Cape, 29, 36. Booth, 22. In Cheshire one, two, or three days will be sufficient in time of sessions. Booth, 22.

(*c*) Booth, 21. Rast. Ent. 255, a. 257, a.

him four inhabitants of the county, two as viewers, and two as summoners. The process of taking the tenements into the king's hands is a mere formal proceeding, the sheriff in the presence of the viewers, verbally seising them into the king's hands. (*a*) As early as the time of Bracton the words *cape in manum nostram* were considered as words of form, and the tenant was not turned out of possession (*b*), and where in dower, upon a writ of grand cape, *cape in manum nostram tertiam partem rectoriæ*, the sheriff took the tithes, and carried them away, the court said, that this was not such a seisin as was intended by the writ, and that the sheriff, by virtue of such a writ, ought to seise generally, but to leave them where he found them. (*c*) The summoners should then proceed to summon the tenant in the same manner as upon the first summons. (*d*)

Service disputed.

If the due service of the grand cape is disputed, and the tenant brings a writ of deceit, the service must be proved, as has been stated, by the examination of the viewers and summoners (*e*) and it may, therefore, be proper, at the present day, to adhere to the old form of service.

Return.

If the sheriff makes no return to the first grand cape, an alias must issue before judgment. (*f*) The sheriff's return is, that he has taken into the king's hands by the view of A. B. and C. D., good and lawful men, &c., the lands mentioned in the writ, and that he has, by E. F. and G. H., given notice to the tenant to be before the justices at Westminster, at the time and place in the writ mentioned. (*g*) The names of the viewers and summoners ought to be returned by the sheriff, but, if the tenant appears and pleads, the omission is not error. (*h*)

The tenant, after being summoned upon the grand cape, cannot be essoigned by the common essoign, because he ought to answer immediately to the first default. (*i*)

Tenant's appearance.

At the return of the grand cape the tenant may appear, and save his default, by waging his law of non-summons, or alleging

(*a*) According to Sir E. Coke, Co. Litt. 259, b, the *pernors* were the persons who seised the land, but *quære* this, for then they should have been examined on the writ of deceit. See *ante*, p. 137, and see Dalt. Sh. 61, b.

(*b*) Bract. 365, b.

(*c*) Michell v. Hyde, 1 Leon. 92, and see Jenk. Cent. 122. Atkins v. Gage, Noy, 152. Keilw. 117, a.

(*d*) See *ante*, p. 146, and Countess of Rutland's Case, 6 Rep. 54, b.

(*e*) See *ante*, p. 137.

(*f*) Keilw. 54, b.

(*g*) See the form in 2 Saund. 43, note.

(*h*) Br. Ab. Retorn. de Br. 86.

(*i*) Fleta, l. 6, c. 14, s. 7. Com. Dig. Exoine, (C). Booth, 15. *Ante*, p. 158.

some other lawful excuse, and it is now usual for the demandant, instead of insisting upon judgment for his default, to waive it, and accept an appearance. (*a*) If the return to the summons be contrary to the 31 Eliz. c. 3, the grand cape may be superseded (*b*), or, if the judgment has been signed, it may be set aside. (*c*)

Judgment upon default.

Where there are several tenants, judgment cannot, in general, be given against one of them for a default, at the return of the grand cape, until the process is determined against the others, some of whom may, it is possible, appear and take the entire tenancy of the lands upon themselves, and after saving their default, bar the demandant for the whole. Thus, in a *præcipe quod reddat* against several, if two have appeared, and a third has made default, and a grand cape has issued against him, and there is *idem dies* given to the two who have appeared, and, upon that day, one of the two who have appeared makes default, and a petit cape issues against him, and he who originally made default again makes default, the demandant cannot have judgment and seisin of the land against the latter, because, on the return of the petit cape, the tenant, who had appeared and afterwards made default, may appear and save his default, and take the entire tenancy upon himself. (*d*) In a *præcipe* by two, if one of the demandants and the tenant make default, and a summons *ad sequendum simul* issues against the demandant who has made default, and a grand cape for the whole land against the tenant, who again makes default, and the demandant who made default appears, judgment shall be given for both the demandants, for the whole land; but, if one of the demandants be summoned and severed, judgment shall be given of the moiety for the other demandant. (*e*)

If a tenant in a real action vouches, and a *summoneas ad warrantizandum* issues against the vouchee, who makes default at the return, a grand cape *ad valentiam* lies against him. (*f*)

(*a*) 2 Saund. 43, a, note, and see *post*, in "Saver default."

(*b*) Furnis v. Waterhouse, 1 Mod. 197. Freeman v. Canham, Barnes, 1.

(*c*) Searle v. Long, 1 Mod. 248, the distringas in this case is analogous to the writ of grand cape.

(*d*) Br. Ab. Grand Cape, 1. Booth, 22. Com. Dig. Pleader, (B. 10).

(*e*) Br. Ab. Process, 79. Default, 46. Booth, 20.

(*f*) See *post*, in "Voucher."

Of Saver Default.

In real actions, in which land is demanded, and in which the process to compel appearance is summons and grand cape, it has been shewn, that if the tenant makes default on the return of the summons, and a grand cape issues, and he again makes default on the return of the latter writ, the demandant is entitled to judgment by default, and the tenant will lose his lands, if such default be insisted on. Nor can the tenant save his land by merely appearing on the return of the grand cape, but he must also, if the demandant insists upon it, save his default, that is, he must shew some valid matter of excuse for his neglect, in not appearing at the return of the summons. If he succeeds in saving his default, the demandant's writ will abate; if he fails, the demandant will recover seisin. But the demandant may, if he please, release the default, and accept an appearance from the tenant, in which case the suit will go on in the regular course.

It should be observed, that it is only in those real actions in which the process before appearance is summons and grand cape, and after appearance petit cape, that it is ever necessary either to save or release a default. In those actions, in which the process is summons, attachment, and distress infinite, the defendant need not save his default at the return of the grand distress, but may simply enter an appearance; nor, as it seems, can it be necessary to save a default in those actions where by particular statutes, if the defendant neglects to appear at the return of the grand distress, the plaintiff is entitled to judgment, as in *quare impedit*. (*a*)

Saver default may be either on the return of the grand cape, which is for a default *before* appearance, or of the petit cape, which lies for a default *after* appearance.

An infant shall not be put to save his default, for he cannot

(*a*) Br, Ab. Sav. Def. 7. Booth appears to be mistaken, when he says, (p. 24,) that in real actions a default for non-appearance must be saved at the return of the grand cape in real *præcipe quod reddat*, and *at the grand distress* in other real actions, where the process is summons, attachment, and distress peremptory; but *quære* as to a *distringas* in lieu of a petit cape, *ante*, p. 154, note (*d*).

wage his law of non-summons; on his appearance on the grand cape therefore, the demandant must count against him, and so also as it seems of a feme covert (*a*), and so where a grand cape *ad valentiam* issues against a vouchee. (*b*)

How a default may be saved.

The causes allowed by law as sufficient to save a default are stated by Sir Edward Coke (*c*) to be. 1. By imprisonment. (*d*) 2. *Per inundationem aquarum.* (*e*) 3. *Per tempestatem.* 4. *Per pontem fractum.* 5. *Per navigium substractum per fraudem petentis, (non enim debet quis se periculis et infortuniis, gratis exponere vel subjacere).* 6. *Per minorem ætatem.* 7. *Per defensionem summonitionis per legem.* 8. *Per mortem attornati si tenens in tempore non novit.* (*f*) 9. *Si petens essoniatus sit.* 10. *Si placitum mittatur sine die.* 11. *Per breve de warrantiâ diei.* (*g*) But sickness is said to be no cause of saving a default, because it may be so artificially counterfeited that it cannot be known. (*h*)

Non-summons.

The most usual cause of saving a default is the want of summons, which the tenant must substantiate by waging his law of non-summons, called in the old language of the law *ley gager de non-summons.* At the present day, the courts would probably, upon motion, set aside a judgment by default where the tenant had not been summoned, upon an affidavit of that fact. (*i*)

Wager of law of non-summons.

If the demandant insists upon the default, then upon the return of the grand cape, the tenant must appear and *wage* or tender his law of non-summons, and a day is given upon which he is to *make* or perfect his law. (*k*) It seems, that if an attorney has been appointed, he may *wage* his law of non-summons, and will then be ordered to have his principal in court, for the purpose of making or perfecting his law, which must be done in person. (*l*) On the day appointed for perfecting his law the tenant may be essoigned, but, if he does not appear on the adjournment day of the essoign, the demandant is entitled to judgment, and the tenant will lose his lands. (*m*)

(*a*) Br. Ab. Sav. Def. 51.

(*b*) Br. Sav. Def. 7, and see in "Voucher," *post.*

(*c*) Co. Litt. 259, b.

(*d*) Br. Ab. Sav. Def. 4.

(*e*) Br. Ab. Sav. Def. 17.

(*f*) Br. Ab. Sav. Def. 15, 17.

(*g*) For this writ, see Br. Ab. *prarog.* 142.

(*h*) Co. Litt. 259, b.

(*i*) Searle v. Long, 1 Mod. 248, and see *ante*, p. 147.

(*k*) Anon. 2 Salk. 682. Stokes v. Annesby, Cro. Eliz. 367. Rast. Ent. 423, b. Co. Ent. 225, b. Clift's Ent. 300.

(*l*) 7 H. 4, 6 a. In the entries in Coke, Rastal, and Clift, above cited, the *wager* of law was not by attorney, and it seems better for the principal to *wage* it in person.

(*m*) Rast. Ent. 424, a. Co. Ent. 328, a. Com. Dig. Abatement, (H. 53).

Upon the day given to perfect his law, or, if he be essoigned, upon the adjournment day of the essoign, the tenant must appear personally in court, with eleven of his neighbours as compurgators, and must swear, that he has not been summoned, but his compurgators need only swear, that they believe what he says to be true. (*a*) It has been held, that less than eleven compurgators may be sufficient (*b*), but, from other authorities, it seems to be essential that there should be eleven. (*c*)

If a corporation aggregate aver non-summons, as they cannot appear personally in court and wage their law, the trial of the fact may be by jury (*d*), and so it may be, as it seems, when the tenant is unable to appear in court on account of illness (*e*); but special matter must be shewn to entitle the tenant to a trial by the country. (*f*)

Release of default.

The demandant may, and usually does release the default at the return of the grand cape, and he may compel the defendant who has appeared to accept this release (*g*), but, if the default be not released at the return of the grand cape, it cannot be released, against the tenant's consent, at the day given him to make his law, but, with his consent, it may be released at the day given to make his law, or on the adjournment day of the essoign, if on that day he be essoigned. (*h*) Upon the default being released, the tenant enters an appearance, and the action proceeds. (*i*) It seems, that if at the return of the grand cape the tenant appears, and the demandant counts against him, this without more is a release of the default. (*k*) A release to one of several jointenants is a release to all. (*l*) If the demandant essoigns himself at the return of the grand cape, the tenant, as has been said, shall not be put to save his default. (*m*) But, if the demandant is not essoigned on the return day of the grand cape, and the tenant wages his law, and has a day given to per-

(*a*) 2 Inst. 45. Anon. 2 Salk. 682.

(*b*) Anon. 2 Vent. 171. Com. Dig. Abatement, (H. 53). Booth, 26.

(*c*) 2 Inst. 45. Co. Litt. 295, a. 155, a. 3 Bl. Com. 343, see the argument in King v. Williams, 5 Barn. and Ald. 538.

(*d*) Br. Ab. Trialles, 3. Case of Abbot of Strata Marcella, 9 Rep. 32, a.

(*e*) Br. Ab. Trialles, 3. Thel. Dig. l. 12, c. 27, s. 18.

(*f*) Br. Ab. Ley Gager, 10.

(*g*) 27 H. 8, 14, a. Br. Ab. Sav. Def. 1. Co. Ent. 175, b. 176, a. 1 Brown. Ent. 203, Rob. Ent. 268.

(*h*) Co. Ent. 223, a.

(*i*) Staple v. Hayden, 1 Salk. 216. 6 Mod. 4, S. C.

(*k*) Br. Ab. Sav. Def. 41.

(*l*) 3 Ed. 4, 21 a. Thel. Dig. l. 12, c. 27, s. 4.

(*m*) Br. Ab. Sav. Def. 5, 9. Com. Dig. Abatement, (53 H). Booth, 24. As to petit cape, see Br. Ab. Essoign, Vin. Ab. Essoign, (D. a).

fect it, and on the latter day the demandant is essoigned, the default is not waived. (*a*)

What pleas the tenant may plead before saving his default.

At the return of the grand cape, and before saving his default, the tenant may plead any pleas in abatement which shew the writ actually abated, but not such as shew it merely abateable. (*b*) If the writ be in fact abated, there remains no default to be saved, for the tenant cannot be bound to appear to a writ which has no existence, but, if the writ be only abateable, then being still in existence, the tenant must shew why he has neglected to appear to it before he can be allowed to abate it by plea. On the return of the writ of cape against several, each of them may take the entire tenancy, or the several tenancy of parcel upon himself, and wage his law (*c*), but, if several tenants wage their law in common, one of them cannot, it seems, afterwards take the entire tenancy upon himself (*d*), nor can a tenant after waging his law of non-summons, plead non-tenure, for, by waging his law, he has admitted himself to be tenant. (*e*)

Consequences of a default saved.

If the tenant saves his default, the writ, as it has been stated, abates, the judgment being, that the demandant *nil capiat per breve*, and that the tenant *eat sine die*. (*f*) If one of two tenants saves his default, the writ abates for the moiety only, and the demandant may recover the other moiety against the other tenant. (*g*) If the tenant fails in saving his default, and it is not released, he will lose seisin of the land and be amerced, his mere right being saved. (*h*)

(*a*) Br. Ab. Sav. Def. 9, 34. Essoign, 136.

(*b*) Co. Litt. 303, b. Br. Ab. Sav. Def. 38. Booth, 25. This rule is very difficult in its application, and has given rise to a great number of contradictory decisions, see Thel. Dig. l. 14, c. 16. Vin. Ab. Default, (D. a.) and Com. Dig. Abatement, (I. 26, 27).

(*c*) Thel. Dig. l. 14, c. 16, s. 14, 20, see *post*.

(*d*) Thel. Dig. l. 14, c. 16, s. 25.

(*e*) Michell v. Hyde, 1 Leon. 92. Br. Ab. Estoppel, 17.

(*f*) Thel. Dig. l. 12, c. 28. Co. Ent. 235, b. Gilb. Hist. C. P. 12.

(*g*) Thel. Dig. l. 12, c. 27, s. 3, 11, 15, l. 16, c. 10, s. 2. Br. Ab. Brief, 81.

(*h*) Fleta, l. 6, c. 14, s. 9. Rast. Ent. 424, a. Co. Ent. 328, a.

Of Summons and Severance.

In personal actions, unless executors be plaintiffs, no summons and severance lies; but in real actions, where one of several demandants refuses to prosecute, a summons may be awarded against him, commanding him to appear, at a certain day, to prosecute the suit, together with the other demandant; and if he does not appear at the return of such summons, judgment is given, that the other demandant shall sue alone, and that he who neglects to appear shall be severed. (*a*) Each demandant in a real action has a distinct moiety or other portion, and there is no reason that he who is willing to proceed should not recover his right. (*b*)

Before appearance.

Summons and severance is always before appearance, for if one of the demandants makes default and fails to prosecute after appearance, no process of summons issues against him, as he has already appeared in court, but he is nonsuited, and judgment is entered that the other demandant *sequatur solus*. (*c*) As each demandant in a real action has a distinct moiety, the nonsuit of one, unless in certain particular cases, is not the nonsuit of the others. (*d*)

Where the writ is abated after summons and severance.

If one of several demandants who has been summoned and severed dies, this, at common law, abates the whole writ (*e*); for this is the act of God, and the writ is actually abated by it; but where the writ would have been rendered *abateable* only by the act of the party, if he had not been summoned and severed, there such act, after he has been summoned and severed, will not abate the writ. (*f*) So in writs judicial in the realty, if the cause of action survive to the other plaintiff, the death of him

(*a*) Booth, 26. Bac. Ab. Abatem. (F). Vin. Ab. Sum. & Sev.

(*b*) Gilb. H. C. P. 243.

(*c*) Read and Redman's Case, 10 Rep. 135, a. Co. Litt. 139, b. Rast. Ent. 593, a. Manly v. Lovell, Hard. 318.

(*d*) Co. Litt. 139, a. Vin. Ab. Nonsuit, (G).

(*e*) Read and Redman's Case, 10 Rep. 134, a. but *quære* stat. 8 and 9 W. 3, c. 11, s. 7. and see *post*, in "Pleas in Abatement;" and see Vin. Ab. Sum. and Sev. (M).

(*f*) Read and Redman's Case, 10 Rep. 134, b.

who has been summoned and severed, will not abate the writ; and so in actions mixed with the realty, in which chattels or things entire are demanded, and the thing survives, if one plaintiff is summoned and severed, and dies, the writ shall not abate. (*a*)

In what actions it lies.

Summons and severance lies, in general, in all real actions in which land is to be recovered, and in writs of error and attaint upon such real actions. (*b*) It lies in an action of waste in the *tenet.* (*c*) In a *quare impedit.* (*d*) In detinue of charters. (*e*) In assise. (*f*) In a writ of *cosinage.* (*g*) In intrusion, ravishment of ward, and other like cases. (*h*) In a *quo jure.* (*i*) In escheat, *formedon*, and *super obiit.* (*k*) In a writ of partition. (*l*) In *deceit.* (*m*)

Where the party severed can take advantage of a judgment recovered by the other.

In all cases where jointenants or coparceners pursue one joint remedy, and the one is summoned and severed, and the other recovers, he who is summoned and severed shall enter with him who recovered; but where their remedies are several, there the one shall not enter with the other till both have recovered. (*n*)

(*a*) Read and Redman's Case, *ubi sup.*

(*b*) Pipe v. Reg. Cro. Eliz. 324. Baddock's Case, 6 Rep. 25, a. Giles's Case, Godb. 59. Co. Litt. 139, a.

(*c*) 2 Rol. Ab. 488, l. 21. Keilw. 47, b. Co. Litt. 355, b.

(*d*) 2. Rol. Ab. 488, l. 23. Pipe v. Reg. Cro. Eliz, 324. Barker v. Bp. of Lond. 1 H. Bl. 417.

(*e*) 2 Rol. Ab. 488, l. 32.

(*f*) Br. Ab. Sum. and Sev. 4, 16.

(*g*) Br. Ab. Judgm. 144.

(*h*) Keilw. 47, b.

(*i*) F. N. B. 128 K.

(*k*) Jenk. Cent. 42.

(*l*) Jenk. Cent. 211.

(*m*) Br. Ab. *Deceit*, 27, and see further, Vin. Ab. Sum. and Sev. (E).

(*n*) Co. Litt. 188, a. 364, a. 2 Inst. 398. Br. Ab. Copar. 2.

Of the Count or Declaration.

Of the count in general.

In general, the rules of pleading which regulate the form of the declaration in personal actions, apply also to the declaration, or count as it is more usually termed, in real and mixed actions.

General writ and special count.

It has been already stated (*a*) that there are certain real actions in which the writ may be general, and the count special. (*b*) The particular instances in which this is allowed will be mentioned in the proper place.

Time and place.

In real or mixed actions, it is not usual to insert a year, day, and place, in the count or declaration, as in personal actions (*c*); but the king's reign is generally mentioned; and where by the statute of limitations, the action must be brought within a certain time, an averment is added, that the demandant or his ancestor was seised within that time. (*d*)

Seisin and esplees.

In most real actions, it is necessary in the count to state, and, if traversed, to prove, the seisin of the demandant, or of the ancestor from whom he claims, and, in general, it is also necessary to aver that he was seised by taking the esplees or profits to the value, &c. (*e*) In some actions, indeed, as in waste, in which land is not expressly demanded, a seisin is not required to be stated, and therefore the taking of the esplees is not averred. (*f*) So in those actions in which, though seisin is alleged, it is not traversable, the taking of the esplees need not be stated. (*g*) Thus, it need not be stated in a writ of escheat. (*h*) Nor in a *cessavit*. (*i*) In a writ of right of advowson, the taking of the esplees must be alleged, not in the demandant himself, but in the incum-

(*a*) *Ante*, p. 16.

(*b*) Com. Dig. Pleader, (C. 15). Vin. Ab. Declaration, (K).

(*c*) Br. Ab. Count, 59. Com. Dig. Pleader, (C. 7).

(*d*) Herne v. Lilborne, 1 Bulstr. 162. Cro. Jac. 293. Yelv. 211, S. C. Br. Stat. of Lim. 13. Com. Dig. Temps, (G. 1).

(*e*) But the *taking of the esplees* is not traversable. Br. Ab. Esplees, 6.

(*f*) Br. Stat. of Lim. 20, 21. Com. Dig. Temps, (G. 10).

(*g*) Com. Dig. Temps, (G. 10).

(*h*) Bevil's Case, 4 Rep. 11, a.

(*i*) Ibid. *ante*, p. 11.

bent. (*a*) The taking of the esplees is alleged to have been *tempore pacis*, for if taken *tempore belli*, when the courts of justice are not open, it is insufficient. (*b*) Of the count in general.

The mode of stating the title of the plaintiff or demandant in the count, varies according to the nature of each particular action, as with regard to the most important real actions, will be seen in the following pages. There are, however, certain rules which apply to all real actions. Thus it is an established rule, that in all real actions brought by an heir on the seisin of his ancestor the demandant must shew *coment heir*, or how he is heir. It is not enough to say that he is heir to such a one generally; but he must set forth, specially, in what manner and *how* he is heir, and that too with accuracy and correctness, otherwise it will be bad on demurrer, or after judgment by default, or on demurrer. (*c*) In those cases, however, in which the omission or inaccuracy does not appear upon the face of the count, and there is no general issue which puts in issue the whole of the demandant's title, as stated in his count, the tenant may take advantage of the omission, by pleading it in abatement. Thus in a *formedon* in the descender, in which it is necessary to convey the descent of the demandant from the original donee, the omission of any of the ancestors who ought to be stated, may be pleaded in abatement (*d*); the usual plea of *non dedit* puts in issue only the creation of the entail, and admits the descent as stated. So in waste, where the plaintiff entitles himself to the reversion in fee, the tenant may plead a devise to the plaintiff in tail. (*e*) Statement of title.

In some cases, in real actions, it is necessary for the demandant to count *de novo*, where a new tenant has been admitted in the course of the suit: thus where, after declaration, the reversioner prays to be received, in an action brought against his tenant for life, and is received accordingly, the better opinion appears to be that the demandant must count against him *de novo*. (*f*) And Count *de novo*.

(*a*) Co. Litt. 17, b.

(*b*) Co. Litt. 249, b.

(*c*) 2 Saund, 45, c. (note). Slade v. Dowland, 2 Bos. and Pul. 570. 5 East, 272, S. C. in Error. Charlwood v. Morgan, 1 N. R. 64, on *demurrer*. Dumsday v. Hughes, 3 Bos. and Pul. 453; and see 2 W. Black. 1100. The king need not shew *coinage*, in a suit for things belonging to the crown. Co. Litt. 15, b.

(*d*) Buckmere's Case, 8 Rep. 88, a. *ante*, p. 56, and *post*, in title "Pleas in Abatement."

(*e*) Com. Dig. Pleader, (3 O. 10).

(*f*) 2 Inst. 345. Booth, 70. Moor, 29. But see Moor, 34, and see in title "Receit." See also Vin. Ab. Declaration, (K).

Of the count in general.

so when the tenant vouches, and the vouchee enters into the warranty, the demandant must count against him *de novo*, as against the tenant. (*a*) So after view granted. (*b*)

Damages.

In general, in real actions, the plaintiff does not demand damages in his declaration, as damages are not recoverable in any real action, strictly so called, and even in those actions in which damages have been superadded by statute, the old form of declaring remains (*c*); but, in some mixed actions, the plaintiff demands damages in his declaration, as in a *warrantia chartæ* (*d*), in a *quare impedit* (*e*), and in waste. (*f*)

Abridgment of plaint or count.

There are some real actions in which the demandant may abridge his plaint or demand. Thus in assise or dower, in which the writ is general, complaining of a disseisin done to, or demanding dower out of, *the freehold* generally, if the tenant pleads non-tenure, jointenancy, &c. to part of the demand, the demandant may abridge or narrow his demand to the residue, and the writ will still remain good; for although he abridges some acres, yet the writ remains good as to the rest, it being *the freehold* still; but in a *præcipe quod reddat*, where a certain number of acres is demanded, the demandant cannot abridge, for he would falsify his writ; and where a writ is acknowledged to be false in part, it must abate for the whole; and even in an assise *de libero tenemento* in A. and B., the plaintiff cannot abridge his plaint as to all in B, for the writ would be made false. (*g*) The plaintiff in assise may abridge his demand at any time before verdict. (*h*) An abridgment seems to be in the nature of a *nolle prosequi* as to part. (*i*)

In a writ of right.

In counting upon a writ of right, the demandant must shew in himself a right, in fee-simple, to the lands demanded; which is done by averring in himself, or his ancestor from whom he

(*a*) Com. Dig. Voucher, (E); and see *post*, in title "Voucher."

(*b*) Davis v. Lees, Willes, 345. See *post*, in title "View."

(*c*) 2 Inst. 286. Pilfold's Case, 10 Rep. 117, a. Com. Dig. Damages, (A. 1, 2). See *post*, in title "Damages."

(*d*) Roll v. Osborn, Hob. 23.

(*e*) Boswell's Case, 6 Rep. 51, b.

(*f*) Co. Litt. 355, b.

(*g*) Br. Ab. Abridgm. 12. Chetham v. Sleigh, 3 Lev. 68. Com. Dig. Abridg. Booth, 29. 2 Saund. 44, a (note). See the entry of Abridgment of Demand in Dower, Lev. Ent. 76.

(*h*) 1 Rol. Ab. 270, l. 33. Br. Ab. Abridg. 15. *Quære* before judgment, Keilw. 116, b. Dyer, 88, a.

(*i*) 2 Saund. 44, a (note). See more as to abridging, in Com. Dig. Abridg.

claims, a seisin in his demesne, as of fee and right; and if he declares on the seisin of his ancestor, by shewing a descent of the right to himself, as heir. The seisin to support a writ of right must, as it has been already stated, be an actual seisin (*a*), and must be averred in the court to have been by taking the esplees, which are evidence of actual seisin. If the writ be brought by a bishop, he must lay the taking of the esplees in himself or his predecessor. (*b*) A purchaser, as we have seen, cannot have a writ of right, except upon his own seisin, for there is no privity between him and his vendor (*c*), and where the demandant claimed as heir to a devisee in fee in remainder, who took by purchase and died before the determination of the particular estate for lives, upon which his remainder was expectant, so that he was never seised of the lands, and upon his death the remainder descended to the demandant as his heir, who, upon the death of the tenant of the particular estate, brought a writ of right without alleging esplees in himself, judgment for the demandant was arrested. (*d*) It is necessary to state, that the person in whom the esplees are laid, was seised *as of right*. (*e*)

In writs of right.

Esplees.

It is necessary that the seisin should be shewn in the count to have been within sixty years, if the writ be brought on the seisin of the ancestor, or within thirty years, if brought on the demandant's own seisin, by statute 32 Hen. 8, c. 2. (*f*)

Time of limitation.

If the action be brought by the demandant as heir, the count must state how the demandant is heir (*g*), whether as son, daughter, brother, or cousin; and if cousin, it must shew *how* cousin. Thus where the count stated, that the lands descended to four women, as nieces and co-heirs of J. S., without shewing how they were nieces, it was held bad upon demurrer, for the four persons stated to be nieces and co-heirs of J. S., might be either four daughters of one brother or sister of J. S., or daughters of four several sisters of J. S. (*h*) And if the demandant in convey-

Title by descent.

(*a*) Bevil's Case, 4 Rep. 9, a. F. N. B. 5 D. *Ante*, p. 22.

(*b*) F. N. B. 5 D.

(*c*) Co. Litt. 293, a. Vin. Ab. Droit de Recto (C). *Ante*, p. 22.

(*d*) Dally v. King, 1 H. Blacks. 1. but the assignee of a bankrupt may count on the seisin of the bankrupt's ancestor. Smith v. Coffin, 2 H. Black. 444.

(*e*) Dowland v. Slade, 5 East, 272.

(*f*) Herne v. Lilburn, 1 Bulstr. 162. Cro. Jac. 293. Yelv. 211 S. C. Br. Stat. of Lim. 13. Com. Dig. Temps, (G. 1). *Ante*, p. 10.

(*g*) *Ante*, p. 175.

(*h*) Dumsday v. Hughes, 3 Bos. & Pul. 453.

In writs of right.

ing his title, through a female, describes her as sister and *heir* of J. S., and it appears upon the face of the count, that J. S. left a son who survived his aunt, it is fatal (*a*) upon error (*b*), although it appear that upon the failure of issue of the son, the issue of the sister of J. S. became his heirs. If the demandant deduces his title from the ancestor seised, through several intermediate ancestors, and misnames one of such ancestors, it is fatal on demurrer. (*c*)

The writ of right differs in the conclusion of the count from other actions, for instead of the usual averment, "and therefore he brings his suit," &c., it ends, "and that such is his right, he offers," &c.

Amendment.

In some late cases, the court of Common Pleas has refused to allow an amendment in writs of right. In Dumsday v. Hughes (*d*), the court observed, that it was not of course to amend, but that the demandant ought to make out a case by affidavit. A rule to shew cause for an amendment was granted, but afterwards discharged on account of the insufficiency of the affidavit. In this case the application to amend was after joinder in demurrer and argument. In Charlwood v. Morgan (*e*), an application was made, after demurrer, to amend a mistake of the pleader, in inserting a wrong christian name, in conveying the descent. Mansfield, C. J. said, that considering the nature of the proceeding by writ of right, how much it had always been discouraged, and how much tenants had been permitted to avail themselves of every advantage to defeat the claims of demandants, he was of opinion, that unless some precedent of such an amendment could be produced, the soundest exercise of the discretion of the court would be, not to allow of such amendment. There had been in this case an adverse possession of more than forty years. Leave to discontinue was also denied on the ground that the reasons for refusing the amendment equally applied to any other matter of favour in such a proceeding. (*f*)

(*a*) Slade v. Dowland, 2 Bos and Pul. 570. 5 East, 272. S. C.

(*b*) It should be observed, that this was a case of error from a court not of record, and that, therefore, no question arose as to the statutes of 27 Eliz. c. 5, and 4 Anne, c. 16, extending to it. 5 East, 284.

(*c*) Charlwood v. Morgan, 1 N. R. 64.

(*d*) 3 Bos. and Pul. 455, cited above.

(*e*) 1 N. R. 64, cited above.

(*f*) In Scott v. Perry, 3 Wils. 306, (differently reported in W. Black. 758,) the court gave the demandant in a *formedon*, (which is a writ of right,) leave to amend the writ on payment of costs, the tenant consenting.

In writs of right.

In the subsequent case of Baylis v. Manning (*a*), an application was made for leave to amend the count, upon an affidavit, stating that inquiry had been made in the country respecting the title, and that the demandant had been misinformed, in consequence of which, the mistake in the count had arisen, and that unless the amendment was allowed, the demandant would be barred by the statute of limitations; but the court refused to allow the amendment, saying, that they considered the case as less favourable than the application in Charlwood v. Morgan. In Maidment v. Jukes (*b*), the court, on the authority of Charlwood v. Morgan, refused to allow the demandant, who had discovered a mistake in his count, to discontinue.

In a very late case of a writ of right brought in the Common Pleas, at Lancaster (*c*), after demurrer to the count, because the words, "as of right," were omitted (*d*), upon application to amend, and argument before Mr. Justice Bayley and Mr. Baron Wood, leave was granted, Wood, B. observing, that he could not agree that writs of right were to be discouraged by the judges, while they remained part of the law of the land, and that he was not for holding it so strict, but that the rule to amend was sometimes to be allowed. The application in this case was supported by an affidavit of merits.

In dower. *Unde nihil habet.*

In dower, as it has been already stated (*e*), the writ is general, that is, it demands only "the reasonable dower of the demandant," without specifying the particular lands, but in the count the particular lands out of which she claims her dower, must be specified. The count ought to be of *a third part* of the whole premises, as the "third part of two messuages, one hundred acres of land," &c., for if the demand be of "*three messuages and fifty acres of land*" it is bad, though three messuages and fifty acres of land be a third part of the whole estate. (*f*) If the count, as usual, demands a third part, &c., and the lands are of gavelkind tenure, the tenant may aver them to be so, and plead in bar, that by custom the wife is entitled to be endowed of a moiety, *dum sola et casta remanserit.* She should have demanded a moiety *dum sola*, &c. (*g*) The count must describe the lands with such

(*a*) 1 N. R. 233.
(*b*) 2 N. R. 429.
(*c*) Goore v. Goore, MS. 1820.
(*d*) See *ante*, p. 177.
(*e*) *Ante*, p. 16.
(*f*) Whelpdale v. Whelpdale, 3 Lev. 169. Com. Dig. Pleader, (2 Y. 2). 2 Saund. 43, d. (note).
(*g*) Hunt v. Gilborne, 1 Leon. 138. Cro. Eliz. 121. S. C. Robins. on Gavel.

In dower. *Undenihil habet.*

certainty that seisin may be delivered by the sheriff; and therefore if it demand a third part of three *tenements* it is bad. (*a*) There is no averment of the production of suit at the end of the count. (*b*) If there be a mistake in the count, it may be amended, even after demurrer and argument. (*c*)

The demandant in dower may abridge the demand in her count, and where the demand is of dower in two vills, may, it seems, abridge as to all the lands in one of the vills. (*d*)

In *formedon.*

In formedon, as it has been already shewn (*e*), the demandant must set out his title in the writ, and the count therefore pursues the writ *mutatis mutandis*, being a fuller statement of the title.

It is not necessary to allege any esplees in the writ, though they must be alleged in the count, and the rule given in Lutwyche (*f*) is, that when a fee simple is demanded, the esplees must be laid both in the donor and the donee; but that when an estate tail only is demanded, it is sufficient to lay them in the donee, as in formedon in the descender. In formedon in the remainder, when a fee is demanded, it is necessary to lay esplees in the donor. (*g*)

In formedon of a copyhold, the demandant must count of a gift made by the copyholder, and not by the lord. (*h*)

In deducing the demandant's title, it is always stated in the count that *the right* of the tenements descended from one ancestor to another, which may be done, although such ancestors have been actually seised under the entail. (*i*)

In assise.

The count or declaration in assise is called a plaint, and differs in several respects from the count in other real actions. It need not be so certain as in other actions, because the judgment is to recover *per visum recognitorum*, and if the plaint be but so certain that the recognitors may put the demandant in possession it is sufficient (*k*); but a plaint *de uno tenemento* is not good. (*l*)

179. 2 Saund, 44, (note). Com. Dig. Pleader, (2 Y. 2).

(*a*) Kent v. Kerry, 3 Mod. 355. 2 Ld. Raym. 1384. S. C. *Ante*, p. 18.

(*b*) See Stephen on Pleading, 428.

(*c*) Whelpdale v. Whelpdale, 3 Lev. 169, by 2 justices against Levinz. Com. Dig. Pleader, (2 Y. 2).

(*d*) Com. Dig. Ab. (A. 2). *ante*, p. 176.

(*e*) See *ante*, p. 55. See form of the count in formedon, Rast. Ent. 362, b. &c.

(*f*) 2 Lutw. 975. Co. Ent. 340, 341, 342. Hearne, 503. Bull. N. P. 116. F. N. B. 220 C.

(*g*) Fitz. Ab. Formedon, 31, and according to Br. Ab. Esplees, 10, in the original remainderman, *s. v.* 6 Rep. 4.

(*h*) Paulter v. Cornhill, Cro. Eliz. 361. 2 Watk. Cop. 36. (2d. edit.)

(*i*) Booth, 145.

(*k*) Dean, &c. of Bristol v. Clerk, Dyer, 84, b. Bac. Ab. Ass. (D). Bull. N. P. 121. Br. Ab. Plaint, 4.

(*l*) Thyn v. Thyn, Style, 77.

In assise.

It is unnecessary to state a title in assise, where it is brought for land, possession, without any other title, being sufficient: and the plaint only stating that the defendant disseised the plaintiff of a messuage, &c. (*a*) But where the assise is brought for an office, a title must be shown in the plaint (*b*); so in an assise for a rent charge, or rent-seck, which is against common right (*c*), and so in an assise of tithes (*d*), and of common. (*e*)

It appears to be necessary in an assise for a newly created office, which cannot be maintained unless the office has a fee or profit annexed to it, to shew such fee or profit in the plaint. (*f*)

The demandant in an assise may abridge his plaint at any time before the jury give their verdict. (*g*)

The plaint being engrossed on parchment, is to be read in court, after the recognitors have been called; and the plaintiff and defendant being also called, the defendant may crave time to plead, and the court, after the assise is arraigned, will adjourn, to give him an opportunity of preparing his plea. (*h*)

In writs of entry.

The count in a writ of entry *sur disseisin*, brought upon the seisin of the demandant himself, after reciting the writ, states that the demandant was seised of the land, &c. in his demesne, as of fee and right, in the time of peace, in the time of such a king, by taking the esplees, &c., and of which the tenant unjustly disseised him, &c. (*i*) If the action be brought by tenant in tail, or tenant for life, it is said that both in the writ and count the demandant may state generally, that he was seised as of freehold (*k*); but it appears to be more regular to show the commencement of the particular estate, both in the count and writ. (*l*) If the action be brought on a disseisin done to the demandant's ancestor, the derivative title from that ancestor must be stated in the count; as the writ may be brought either in

(*a*) Windebanke v. Beere, 1 Sid. 73. Jenk. Cen. 42. Bac. Ab. Ass. (D). Br. Ab. Plaint, 1.

(*b*) Vaux v. Jefferen, Dyer, 114, b. Hunt v. Allen, Dyer, 149, a. Savier v. Lenthal, 3 Mod. 273. Salk. 82. Comb. 173. Lilly's Ass. 93. S. C. variously reported. Lilly's Ass. 41, 70, 76, 94.

(*c*) Booth, 270. Brediman's case, 6 Rep. 56, b. but assise for rent generally shall be intended for a rent service, Br. Ab. Plaint, 1.

(*d*) Dean, &c. of Bristol v. Clerk, Dyer, 83.

(*e*) Br. Ab. Assise, 199. Plaint, 1.

(*f*) John Webb's case, 8 Rep. 49, b. Bac. Ab. Ass. (D). but see Booth, 271.

(*g*) 1 Rol. Ab. 270, l. 32. 1 Dan v. Ab. 580. *Ante*, p. 176.

(*h*) Lilly's Ass. 33.

(*i*) Rast. Ent. 276, b. Booth, 176. 3 Chitty on Plead. 620.

(*k*) Dyer, 101, a. Booth, 177. F. N. B. 192 A. 2 And. 100.

(*l*) F. N. B. 191 E. note (*a*). Rast. Ent. 277, b.

In writs of entry.

the *per*, the *per* and *cui*, or the *post* (*a*), the count must be framed accordingly. The count in the other writs of entry, except in the statement of the injury, resembles the count in a writ of entry *sur disseisin*. (*b*) In a writ of entry *sur disseisin* in the *post*, the court refused to amend the writ and count by altering the name of the *disseisor*. (*c*)

In *quare impedit*.

As soon as the defendants in a writ of *quare impedit* have appeared, the plaintiff must count against them; and if one of several defendants alone appears, the plaintiff may declare against him with a *simul cum*, and if the defendant pleads *ne disturba pas*, a writ may be awarded to the bishop, with a *cesset executio*, until the plea between the plaintiff and the other defendants is determined. (*d*)

In framing the declaration, four points are to be particularly attended to. 1. The title of the ancestor or other person, under whom the plaintiff claims, who last presented to the benefice. 2. The derivative title. 3. The presentation by the plaintiff, or some person under whom he claims: and 4. The disturbance. (*e*)

Title.

1. The plaintiff in *quare impedit* must allege a title, for without that he does not shew his right to recover. (*f*) And as in other cases of statement of title, a seisin in fee must be alleged, and if the plaintiff has only a particular estate he must deduce his title from the tenant in fee. (*g*) It appears formerly to have been held that it was sufficient to state a presentation only, in the person from whom the plaintiff claimed, because a presentation was evidence of a seisin in fee, even an usurper gaining a seisin in fee by a wrongful presentation; but now since the statute, 7 Anne, c. 18, no estate is devested by an usurpation, and it therefore seems to be necessary, in all cases, to state a seisin in fee. If the plaintiff have a less estate than a fee, he must deduce his title from the owner of the fee: thus the tenant in tail of an advowson must allege a title in fee in the donor, and derive his title from him. (*h*) A title to the advowson must be alleged in case

(*a*) *Ante*, p. 89.

(*b*) See the form of the count in intrusion, Rast. Ent. 415, b. Booth, 182. 3 Chitty's Plead. 611. *Cui in vita*, Booth, 186. *Dum fuit non compos mentis*, Rast. Ent. 248, b. *Dum fuit infra ætatem*, *Ibid.* Booth, 194. *Ad terminum qui præteriit*, Rast. Ent. 25, b. *In casu proviso*, *In consimili casu*, Rast. Ent. 123, Booth, 198. *Entry sur abatement*, Smith v. Coffin. 2 H. Blacks. 444.

(*c*) Hull v. Black, 4 Taunt. 572, but see Dyer, 101, a.

(*d*) 1 Brownl. 158.

(*e*) See Mallory's Q. I. 200.

(*f*) Digby v. Fitzherbert, Hob. 102. R. v. Bp. of Worcester, Vau. 57.

(*g*) *Ibid.*

(*h*) Coppledick v. Tansy, Hutt. 31, Countess of Northumb. case, 5 Rep. 98, a. Com. Dig. Pleader, (3 I. 4).

of the king as well as of a common person (*a*); and the king must allege in what right he is seised. (*b*) But if the king entitle himself to a presentation by a simoniacal contract, it is sufficient to allege a presentation by such a person *cui de jure pertinuit*, without shewing what title he had to the advowson, for the king is a stranger to the title. (*c*) *In quare impedit.*

The plaintiff must shew a title in himself before the avoidance, and therefore if the acceptance of a plurality, by which the church is void, be alleged at a day before the grant of the next avoidance, in an action by the grantee, it is bad. (*d*) And such grantee must shew that the avoidance in question is the next avoidance. (*e*)

The plaintiff must shew whether the advowson be appendant, or in gross. (*f*)

If the plaintiff claim a right to present against common right, he must shew the commencement of it, as if he allege presentation by turns, he must shew how it commenced, whether by prescription, composition, or otherwise (*g*); but where the plaintiff claims a turn to an advowson appendant, he need not shew the commencement of the presentation by turns, whether by prescription, composition, or otherwise, for the appendancy imports a prescription. (*h*)

A composition to present in turns may commence between parceners, jointenants and tenants in common, by record or by deed, and between parceners by parol. (*i*) And after every tenant in common, &c. has presented in turn, the composition is executed, and the composition or indenture need not be shewn in the declaration. (*k*) By statute 7 Anne, c. 18, if coparceners, or jointenants, or tenants in common, be seised of any estate of inheritance in the advowson of any church, &c., and a partition is made between them to present by turns, every one shall be taken and adjudged to be seised of his or her separate part of

(*a*) Vaugh. 57.

(*b*) The Queen and the Bp. of York's case, 1 Leon. 227, though *the writ* may be general, see 1 Saund. 186, d. (note 1).

(*c*) *Semb.* 2 Lut. 1093. Com. Dig. Pleader, (3 I. 4).

(*d*) Agard v. Bishop of Peterborough, Dyer, 129, b. and Wats. Clerg. Law, 88.

(*e*) *Ibid.*

(*f*) *Semb.* Lutw. 1. Vaug. 7, 8. Com. Dig. Pleader, (3 I. 4).

(*g*) Cheverton's case, 3 Leon. 168, and see Birch v. Bp. of Litchfield, 3 Bos. and Pul. 444.

(*h*) Eveleigh v. Turner, Dyer, 299, a. Moor, 867.

(*i*) Bp. of Salisbury v. Phillips, 1 Salk. 43. Carth. 505, S. C.

(*k*) *Ibid.* Dyer, 29, a.

In *quare impedit.* the advowson, to present in his or her turn; and if there be two, and they make such partition, each shall be said to be seised, the one of the one moiety to present in the first turn, the other of the other moiety to present in the second turn; in like manner if there be three, four, or more, every one shall be said to be seised of his or her part, and to present in his or her turn.

Conveyance of title. 2. The plaintiff must convey his title from the person who is stated to have been seised in fee, in the same manner as in other cases.

Presentation. 3. Presentation (*a*) is the only actual seisin which can be had of an advowson; and alleging presentation in a *quare impedit* is equivalent to alleging esplees in a writ of right. (*b*) The plaintiff must in all cases allege a presentation, either by himself, or by his ancestor, or by some person under whom he claims, for to count of an estate and seisin without a presentation is bad. (*c*) And it is said to be necessary to allege a presentation though the advowson be vested in the patron by act of parliament. (*d*) The king as well as a subject, must allege a presentation (*e*); but it is said, that if the king is entitled to an advowson by office, he shall have a *quare impedit* without a presentation, for the office puts the king in possession and every one else out of possession. (*f*)

By whom. The presentation ought regularly to be alleged to have been by him in whom the seisin in fee is laid, but a presentation by a person claiming under him, being in law a presentation by him, will be sufficient. Thus a presentation by a grantee of the next avoidance is sufficient, as if the plaintiff in his count state, by way of title, that A. was seised of the advowson in fee, and granted the next avoidance to B., and afterwards the church being void, B. presented, and so convey the descent to himself, without alleging any presentation by A. And a presentation by tenant for life, in dower, by the curtesy, for years, by statute merchant, &c.,

(*a*) The cases of Stanhope v. Bp. of Lincoln, Hob. 237, and R. v. Bp. of Worcester, Vaugh. 53, contain almost the whole law on the subject of alleging presentation. "Hobart and Vaughan are the authors who have entered deepest into, and treat best of this subject." per Ld. Hardw. 2 Str. 1011.

(*b*) Tufton v. Temple, Vaughan, 8. R. v. Bp. of Landaff, 2 Str. 1011. F. N. B. 33 H.

(*c*) Tufton v. Temple, Vau. 7. R. v. Bp. of Worcester, Vaug. 57.

(*d*) Reynoldson v. Bp. of London, 3 Lev. 436. Com. Dig. Pleader, (3 I. 5). Contra, 21 Ed. 4. 3 b, Wats. Clerg. Law, 248. Jenk. Cent. 188.

(*e*) R. v. Bp. of Landaff, 2 Str. 1011.

(*f*) 2 Rol. Ab. 378, l. 10. Contra 17 Ed. 3, 10 b. and see Mall. Q. Imp. 156, and Wats. Clerg. Law, 248.

is a good seisin for the reversioner. (*a*) And in a *quare impedit* by tenant for life or years, it is sufficient if the plaintiff allege seisin in his lessor, the demise and a presentation by himself. (*b*) A presentation by lapse, by the ordinary, is a sufficient seisin (*c*), and so a presentation by the father is sufficient for the wife of a son tenant in dower. (*d*) So the presentation in a grantor of an advowson is sufficient in a *quare impedit* brought by the purchaser. (*e*) *In quare impedit.*

If the presentation be alleged in the lessor or donor, and also in the lessee or donee, it is not double; for the presentation of the lessor or donor alone is traversable. (*f*)

Regularly the last presentation must be mentioned, and therefore, if the bishop present by lapse, the patron in a *quare impedit* upon the next avoidance, must mention that presentation, for it is made in right of the patron; but if there be an usurpation on the king, a grantee of the next avoidance need not mention that, but merely the last presentation by the king (*g*), for the king cannot be put out of possession by an usurpation.

There are some cases in which, on the ground of necessity, the allegation of a presentation is dispensed with. Thus, if a man, by the king's licence, erect a church, and is disturbed in presenting to the same, he may have a *quare impedit*, without alleging any presentation in his count; but he must shew the special matter (*h*); and when a man recovers in a writ of right of advowson, he may present at the next avoidance, and if disturbed, shall have a *quare impedit*, without alleging any presentation in himself or his ancestors, but may declare upon the record. (*i*) *When dispensed with.*

The want of alleging a presentation is cured by verdict. (*k*)

3. The declaration must allege a disturbance. If the action *Disturbance.*

(*a*) Countess of Northumberland's case, 5 Rep. 97, b. Cro. Eliz. 518. Moor, 455, S. C. 2 Rol. Ab. 377, l. 26, 37.

(*b*) Palmes v. Bp. of Peterb. 1 Leon. 230. Com. Dig. Pleader, (3 I. 5).

(*c*) 2 Rol. Ab. 377, l. 3.

(*d*) 2 Rol. Ab. 378, l. 5.

(*e*) 2 Inst. 356. Wats. Cl. Law, 249. 2 Rol. Ab. 378, l. 47. *Ante*, p. 27.

(*f*) Northumberland's case, 5 Rep. 98, a. Cro. Eliz. 518. Moor, 455. S. C. but see Jenk. Cent. 188.

(*g*) Anon. 3 Leon. 17. Hob. 140. *Darrein presentment* is a good plea in abatement. See *post*, title "Pleas in Abatement," p. 207.

(*h*) F. N. B. 33 H. Wats. Cler. Law, 248. Jenk. Cent. 188.

(*i*) Fitz. Ab. Quare Imp. 171. 2 Rol. Ab. 378, l. 20. F. N. B. 56 A. Br. Quare Imp. 142; but it is said in F. N. B. 33 I. that the presentation may be alleged in the recoveree.

(*k*) R. v. B. of Landaff, 2 Str. 1006.

In *quare impedit.*

be brought by an executor or administrator, on an avoidance in the time of his testator or intestate, it is sufficient to allege a disturbance in the lifetime of the testator or intestate, but it must not be alleged *in retardatione executionis testamenti.* (*a*)

In several cases where the writ is general, that the defendant permit the plaintiff to present to the church, the declaration may be special, as to present every third turn. (*b*)

Amending.

The court will allow the plaintiff to amend his declaration in *quare impedit*, upon payment of costs. (*c*)

In waste.

The cause of action in waste is the injury supposed to be done to the plaintiff's inheritance, and it is therefore necessary that he should in his declaration properly entitle himself to the inheritance. Thus, if he counts upon a lease by himself, he must shew his seisin in fee, and the demise to the defendant (*d*); or if upon a lease by his ancestor, that ancestor's seisin, the demise to the defendant, and the descent to himself (*e*); so, if the plaintiff claims by fine or recovery, he must plead such fine or recovery, and shew the uses of it (*f*); but the plaintiff need not name himself assignee, if he sets out his title specially. (*g*) If the plaintiff claims as assignee of the reversion, he must shew his title by grant or devise. (*h*) If the plaintiffs sue as parceners or jointenants, the declaration should shew them to be so (*i*); so if the plaintiff sues as rector *in jure ecclesiæ*. (*k*) If husband and wife, in right of the wife, bring the action, the declaration must state the reversion to be in them both; namely, that they are seised of the said reversion in their demesne as of fee, in right of the wife. (*l*) Where the plaintiff counted upon a feoffment to A. to the use of, &c. (alleging uses of the inheritance) it was held sufficient without saying that the feoffment was to A. and his heirs. (*m*) And it was held by two judges, that the words

(*a*) Sav. 95. 1 Lutw. 2. 1 Leon. 205. Com. Dig. Pleader, (3 I. 6). As to disturbance, see *ante*, p. 100.

(*b*) Windham v. Bp. of Norwich, 1 Brownl. 165, and see *ante*, p. 17, and Wats. Clerg. Law, 252, 270.

(*c*) Reppington v. Tamworth School, 2 Wils. 118.

(*d*) Ewer v. Moile, Yelv. 140. Com. Dig. Pleader, (3 O. 2). 2 Saund. 235 (note 2).

(*e*) Co. Ent. 708, b.

(*f*) Co. Ent. 701, a. Win. Ent. 1025. (1139). 2 Lutw. 1542.

(*g*) 2 Rol. Ab. 831, l. 46.

(*h*) Greene v. Cole, 2 Saund. 234. 2 Lutw. 1543. Co. Ent. 692, 693. Cro. Eliz. 64.

(*i*) Win. Ent. 1049, (1163).

(*k*) *Ibid.* 1047, (1161).

(*l*) Earl of Clanrickard v. Sidney, Hob. 1.

(*m*) Skeat v. Oxenbridge, Hob. 84. 2 Rol. Ab. 832, l. 40.

In waste.

"to the disinheriting," after verdict, cure the want of stating the quantity of estate, of which the plaintiff was seised, the declaration only alleging that the plaintiff was seised, without shewing of what estate (*a*), but this opinion has been doubted. (*b*) It is also held, that though the writ is general "whose heir he is," which *primâ facie* imports a descent in fee, yet it is no variance to state in the declaration a special inheritance in tail (*c*), and if the plaintiff shews a fine to the use of B. for life, remainder to A. and the heirs of his body, remainder to the plaintiff in fee, and that A. died, *per quod* B. was seised for life, remainder to the plaintiff in fee; and that B. committed waste to his disherison, this supplies the omission, that A. died *without issue*. (*d*) Where the tenant holds for half a year only, the writ runs, "which he holds for term of years," but the plaintiff must declare specially according to his case. (*e*)

The declaration must assign the waste conformably to the writ, and if the writ is for waste in land, and it is assigned in cutting wood, this is bad (*f*), and it must particularise the quantity and quality of the waste; though, to maintain the action, the plaintiff is not bound to prove the whole waste laid, but shall recover *pro tanto* (*g*); therefore, where the waste complained of is in cutting trees, and the felling of each tree would in itself be waste, it seems the declaration must shew the number of the trees (*h*); but where the action is brought for waste in trees, where the cutting of each particular tree would not in itself be waste, but the quantity cut makes it so, the declaration must be so many loads (*i*); so if waste is assigned in houses, the declaration must shew the particular defects. (*k*) But it is sufficient to assign waste directly, without shewing the particular manner in which it was committed, thus if the waste was committed by a stranger, it is sufficient to say that the defendant committed waste in cutting, without saying, in permitting the stranger (*l*); or if it is for destroying germins, it is sufficient to say that he destroyed the germins generally, without saying that he suffered the

(*a*) Aston v. Whetenall, Cro. Eliz. 57.
(*b*) By Sergt. Williams, 2 Saund. 255, note (2).
(*c*) Lewknor v. Ford, 1 Leon. 48.
(*d*) Stonehouse v. Corbet, Cro. Car. 400.
(*e*) Co. Litt. 54, b.
(*f*) Moor, 73. Com. Dig. Pleader, (3 O. 4.) (C. 13).
(*g*) Com. Dig. Pleader, (3 O. 5). 2 Saund. 235, a, note (2).
(*h*) 2 Rol. Ab. 832, l. 48.
(*i*) 2 Rol. Ab. 832, l. 53.
(*k*) Com. Dig. Pleader, (3 O. 5).
(*l*) 2 Rol. Ab. 833, l. 7.

In waste.

hedges of the wood to be neglected; whereby cattle entered and eat the germins. (*a*)

The declaration must be *ad exhæredationem*, of the plaintiff (*b*), and if the writ be brought by husband and wife, seised in right of the wife, it shall be *ad exhæredationem* of the wife. (*c*)

In partition.

Where the writ of partition is brought between coparceners or jointenants, the declaration must shew how they are coparceners or jointenants, but not so if it be between tenants in common, for they claim by several titles, and the one is not conusant of the other's title (*d*); so a declaration, which shews that the estate was the inheritance of the common ancestor in tail, is sufficient without saying how the estate tail commenced (*e*); but where the declaration unnecessarily states a wrong title, as a seisin in fee, when it was in fact only a seisin in tail, the writ may be abated. (*f*)

The court will permit the declaration in a writ of partition to be amended, by striking out an erroneous description of the quality of the estates conveyed to the different parties. (*g*)

In *warrantia chartæ*.

The count in *warrantia chartæ* must shew the specialty of the warranty and the lien (*h*), that is, it must shew the deed by which the warranty is created, and in what manner the plaintiff is entitled to take advantage of the *lien*, or obligation to warrant. The count concludes *to the damage of the plaintiff* though the action be brought *quia timet*, in which case no damages are recoverable. (*i*)

With regard to other real actions of less importance, it will be sufficient to mention where the form of the count may be found. (*k*)

(*a*) 2 Rol. Ab. 833, l. 5.

(*b*) Com. Dig. Pleader, (3 O. 6).

(*c*) 2 Rol. Ab. 832, l. 15, 20.

(*d*) Yate v. Windham, Cro. Eliz. 64. Com. Dig. Pleader, (C. 34.) (3 F. 2). *Ante*, p. 131. For the form of the count in partition, see Rast. Ent. 454, b. Co. Ent. 409, b. &c. 3 Ch. Pl. 670.

(*e*) Haward v. Duke of Suffolk, Dyer, 79, b. Com. Dig. *ubi sup.*

(*f*) Moor v. Onslow, Cro. Eliz. 760.

(*g*) Baker v. Daniel, 6 Taunt. 193. 1 Marsh. 537. S.C.

(*h*) Roll v. Osborn, Hob. 21. Com. Dig. Pleader, (3 N. 3).

(*i*) *Ib.* 23. For the forms of declarations in War. Char. see Rast. Ent. 396, b. &c.

(*k*) For the various writs of entry, see *ante*, p. 182, note (*b*).

Aiel (*a*), *Cosinage* (*b*), *Cessavit* (*c*), *Darrein presentment* (*d*), *Estrepement* (*e*), *Mesne* (*f*), *Ne injuste vexes* (*g*), *Nuper obiit* (*h*), Assise of nuisance (*i*), *Quare ejecit infra terminum* (*k*), *Quod ei deforceat* (*l*). *Quod permittat* (*m*), *Quo jure* (*n*), *Rationabilibus divisis* (*o*), *Secta ad molendinum* (*p*), *Juris utrum* (*q*), Escheat (*r*), *Quo jure* (*s*).

(*a*) Rast. Ent. 28, b. Lilly's Ent. 92.
(*b*) Rast. Ent. 29, b. Herne's Pleader, 258.
(*c*) Rast. Ent. 110, b.
(*d*) Rast. Ent. 144, a.
(*e*) Rast. Ent. 317, a. Herne's Pleader, 477.
(*f*) Rast. Ent. 433, a. Herne's Pleader, 577.
(*g*) Rast. Ent. 437, b.
(*h*) Rast. Ent. 440, b. Co. Ent. 407, a.
(*i*) Rast. Ent. 441, a.
(*k*) Rast. Ent. 496, a.
(*l*) Rast. Ent. 537, a. Co. Ent. 525, b. Herne's Pleader, 640, b.
(*m*) Rast. Ent. 538, b. Co. Ent. 526, b. Herne's Pleader, 641, b.
(*n*) Rast. Ent. 539, a.
(*o*) Rast. Ent. 541, a.
(*p*) Rast. Ent. 591, b. Co. Ent. 461, a.
(*q*) Co. Ent. 399, b.
(*r*) Rast. Ent. 314, a. Herne's Pleader, 473.
(*s*) Herne's Pleader, 639, b.

Of Pleas in Abatement.

Non tenure.

WHEN he who is made tenant in a real action is not in fact the tenant of the freehold, he may plead non tenure in abatement. This plea is either general or special, and is pleaded either to the whole or part of the land demanded. (*a*) The plea of non tenure, though usually called a plea in abatement, concluding with praying judgment of the writ, is not strictly so, though a dilatory, for it does not give the demandant a better writ. (*b*)

General.

In a general plea of non tenure the tenant says, that he was not tenant of the freehold of the land or rent demanded, on the day of the writ purchased, or ever after (*c*), and it is not sufficient to say, that he was not tenant, at the time of the purchase of the writ, or of the summons, because, if not tenant at that time, yet, if he should purchase *pendente brevi*, it will make the writ good. (*d*) But, in a writ of intrusion, it appears, that the tenant may plead, that such a one died seised, and that the lands descended to him, pending the writ, with a traverse that he was tenant at the time of the writ brought, not saying at any time after (*e*), for this plea shews that the tenant was not an intruder at the time of the action being brought.

In a plea of general non tenure the tenant need not shew who is tenant, for he is brought into court to answer a demand which he seems to be in no way privy to, but utterly disclaims (*f*); and, if the tenant plead non tenure, and that such a one is tenant, the plea is good, though the person alleged be not tenant. (*g*) If the defendant has made a feoffment before the action, with intent to defraud the demandant, this feoffment is void,

(*a*) Com. Dig. Abatement, (F. 14). Booth, 28. Bracton, 431. Doctr. Pl. 4.

(*b*) 2 Saund. 44, b. (note).

(*c*) Br. Ab. Non Ten. 25. Booth, 28. Thel. Dig. l. 11, c. 22. Rast. Ent. 440.

(*d*) Thel. Dig. l. 11, c. 23, s. 10. l. 16, c. 3, s. 1, 2. Br. Ab. Brief, 46.

(*e*) Rast. Ent. 416, a. In the replication the demandant passes by the tenant's traverse, and traverses the dying seised. *Ibid.* Booth, 184.

(*f*) Fowle v. Doble, 1 Mod. 181. Gilb. Hist. C. B. 250. Thel. Dig. l. 11, c. 22, s. 4.

(*g*) Dal. 101.

and the demandant, upon issue on the plea of non tenure, shall have a verdict. (*a*) Non tenure.

A plea of special non tenure is of several kinds, as where the tenant claims some interest, but not a freehold in the land, and alleges that he has common, and put his cattle into the land, as in his common, without this that he has any other possession, and that such a one is tenant of the freehold (*b*), or that he holds only for years, by statute merchant, *elegit*, &c., and that such a one is tenant of the freehold. (*c*) So the tenant may plead non tenure to part of the land demanded, shewing who is tenant. (*d*) At common law, non tenure as to parcel of the land abated the whole writ, but by the statute 25 Ed. 3, c. 16, no writ shall be abated but for the quantity of the non tenure which is alleged (*e*); and, if an action be brought for lands lying in different vills, it is sufficient to plead non tenure to one hundred acres, without shewing in which vill they lie. (*f*) If the thing demanded be entire as a manor, and not several, as so many acres, non tenure of parcel shall abate the whole writ even since the statute of Ed. 3 (*g*), and so in a writ of *cessavit* non tenure of parcel will abate the whole writ, for the tenant cannot tender the arrearages for the whole demand. (*h*) Special.

With regard to the actions in which non tenure can be pleaded, it may be pleaded generally in all actions in which land or rent is demanded, but, in pleading non tenure, where rent is demanded, the tenant must say, that he is neither pernor of the rent, nor tenant of the land out of which, &c. (*i*) In what actions.

In waste non tenure is not a good plea, because the action lies against the tenant who committed the waste, although he has assigned his estate (*k*), but tenant for life or years may plead the assignment in bar, averring that no waste was committed before the assignment. (*l*)

(*a*) Leonard v. Bacon, Cro. Eliz. 233. Sav. 126.

(*b*) Thel. Dig. l. 11, c. 22, s. 41.

(*c*) *Ibid.* s. 48, but tenant at will may plead general non tenure. *Ibid.*

(*d*) Br. Ab. Non Tenure, 5, 52. Fowle v. Doble, 1 Mod. 181. Gilb. Hist. C. B. 251.

(*e*) Br. Non Tenure, 33. 1 Mod. 181. Reg. Br. 228, b. Gilb. Hist. C. B. 250. Thel. Dig. l. 11, c. 23.

(*f*) Fowle v. Doble, 1 Mod. 181.

(*g*) P. Bromley, C. J., in Fulmerstone v. Steward, Plowd. 109, b. Stradling v. Morgan, *ibid.* 205, a. Thel. Dig. l. 8, c. 22, s. 23. Jenk. Cent. 15.

(*h*) Br. Ab. Non Tenure, 44. Thel. Dig. l. 11, c. 23, s. 29.

(*i*) Thel. Dig. l. 11, c. 22, s. 44.

(*k*) Br. Ab. Non Tenure, 71. Thel. Dig. l. 11, c. 22, s. 3. *Ante*, p. 123.

(*l*) Co. Ent. 697, b, and see *post*, in "Pleas in Bar."

Non tenure.

In attaint, it is said, that generally non tenure cannot be pleaded (*a*), but it seems, that this must be confined to cases where the party pleading it was privy to the first record. (*b*)

In an action of deceit non tenure is no plea, because the writ may be brought against the person who deceitfully recovered, without joining the terre-tenants, who may be brought in by *scire facias* (*c*), and for the same reason non tenure is no plea in a writ of error. (*d*)

It seems, that in *post disseisin*, non tenure is no plea, for that action may be maintained against a *post disseisor*, though he be not tenant of the land. (*e*)

In an assise of *darrein presentment* non tenure is no plea. (*f*)

In writs which are founded upon privity of blood, and brought by one heir against another, as a writ of right *de rationabili parte* (*g*), and a writ of *nuper obiit* (*h*), non tenure cannot be pleaded. If the tenants are not in fact co-heirs, they ought to disclaim in blood, and so abate the writ (*i*), but, if they are co-heirs, they are the proper tenants to the demandant's writ.

In a *scire facias*, to have execution, or to warn the terre-tenants in real actions, general non tenure appears to be in no case a good plea (*k*), for, if pleaded, it seems that the demandant may have judgment, *suo periculo*, and execution (*l*), but it seems, that a special non tenure may be pleaded by a tenant who was not party to the first recovery. Thus the tenant in a *scire facias* may plead that A., the tenant in the former suit, being seised in fee, leased to him for years the land in the *scire facias* mentioned, for A. may have a release which the lessee for years cannot have (*m*), but, in a *scire facias*, upon error to reverse a common recovery, a plea of non tenure, and that certain persons were terre-tenants, was held ill on demurrer. (*n*)

(*a*) Com. Dig. Abatement, (F. 14).

(*b*) Br. Ab. Non Tenure, 1, 6, 16, 41. Thel. Dig. l. 11, c. 22, s. 17.

(*c*) Thel. Dig. l. 11, c. 22, s. 33. Fitz. Ab. Deceit, 8. *Ante*, p. 187.

(*d*) Br. Ab. Non Tenure, 37, 42, but see Br. Ab. Error, 27, that this only applies to the party to the former action, or his heir, *quære*.

(*e*) F. N. B. 191 A. Thel. Dig. l. 11, c. 22, s. 39.

(*f*) Thel. Dig. l. 11, c. 22, s. 34.

(*g*) Thel. Dig. l. 11, c. 22, s. 40. F. N. B. 9 O.

(*h*) F. N. B. 197 D F. Thel. Dig. l. 11, c. 22, s. 14, *contra*.

(*i*) Thel. Dig. l. 11, c. 34, s. 7.

(*k*) Br. Ab. *Sci. fa.* 107. Thel. Dig. l. 11, c. 22, s. 25, but see Bacon's Ab., *Scire facias*, (E). 2 Salk. 601.

(*l*) Rast. Ent. 279, a. Thel. Dig. l. 11, c. 22, s. 25. Br. Ab. Non. Ten. 19. *Sci. fa.* 84. Jenk. Cent. 15.

(*m*) Jenk. Cent. 15. Br. Ab. Non Tenure, 43, 46. *Sci. fa.* 107, 108. Kempe v. Lawrence, Owen, 134.

(*n*) Hall v. Woodcock, 1 Burr. 360.

Non tenure.

Where one defendant pleads non tenure, and the other takes the entire tenancy upon himself, the demandant need not reply to the plea of non tenure, upon which no judgment is given (*a*); and, in dower, if the tenant pleads non tenure as to parcel, and is ready to render the remainder, the plaintiff has an election to have judgment of the part confessed, and to waive the remainder, or to maintain her writ for the whole. (*b*)

When pleaded.

With regard to the time within which non tenure must be pleaded, it is to be observed, that as it is a plea in abatement, it cannot be pleaded after a general imparlance (*c*); nor can it be pleaded after the tenant has acknowledged himself to be tenant, as by waging his law of non summons. (*d*)

Replication.

The usual replication to a plea of non tenure is, that the defendant was tenant as the writ supposes (*e*), or the demandant may reply, that the tenant has made a feoffment to persons unknown, to defraud him, &c. averring that he takes the profits; and the pernancy of the profits, and not the feoffment, is traversable. (*f*) Upon a plea of non tenure, even in actions where no damages are recoverable, as in formedon, the demandant may reply, and maintain his writ, for the writ does not immediately abate by this plea, as by a plea of disclaimer. (*g*) Upon a plea of non tenure, judgment for the tenant is, that he go quit. (*h*)

Disclaimer.

The plea of disclaimer is very analogous to that of non tenure. In real actions, where no damages are recoverable, but the freehold alone is in question, if the defendant disclaims the tenancy, the writ abates, and judgment is given, that the tenant go without day, but the demandant, after this judgment given, may enter into the tenements demanded. The demandant thus obtains the effect of his suit, and it is obviously unnecessary to carry on the proceedings further. (*i*) But, in actions where da-

(*a*) Thel. Dig. l. 11, c. 22, s. 45. Com. Dig. Abatem. (F. 14).

(*b*) Thel. Dig. l. 11, c. 23, s. 9.

(*c*) Hetley, 142. Barrow v. Hogget, 3 Lev. 55. Dyer, 210, b. Per Dyer, Moor, 33. *contra*, Thel. Dig. l. 14, c. 2, s. 18.

(*d*) Br. Ab. Non Ten. 4. Estoppel, 17, but see Estop. 54, and Non Ten. 46.

(*e*) Br. Ab. Maintenance de Brief, 42. Ast. Ent. 10. 1 Lutw. 38.

(*f*) Br. Ab. Peremptory, 40. Parnour, 18.

(*g*) Hunlock v. Petre, 3 Lev. 330.

(*h*) Com. Dig. Abate. (F. 14). Co. Litt. 236, b.

(*i*) Litt. s. 691. Co. Litt. 362, b. Thel. Dig. l. 11, c. 34. Gilb. Hist. C. B. 249. Com. Dig. Abatement, (F. 15). Br. Ab. Disclaimer, 17.

Disclaimer.

mages are recoverable, there the demandant may reply and maintain his writ, for the sake of the damages, or, if he please, he may pray judgment, and enter (*a*), and a plea of non tenure, with a disclaimer, is the same in effect as a disclaimer. (*b*)

In a *cessavit*, it is said, that the tenant cannot disclaim, but he may plead that he does not hold of the demandant (*c*), so in a *per quæ servitia*, the tenant cannot disclaim to hold of the conusor. (*d*) In a *nuper obiit*, if the tenant disclaims in the blood, the writ shall abate, but, if the tenant says, that he claims not by descent but by purchase, the demandant may reply and maintain his writ. (*e*) In a writ *de consuetudinibus et servitiis*, if the tenant disclaims, and the writ abates, the demandant may have a writ of right *sur disclaimer* (*f*), and in a *quare impedit*, if the defendant disclaims, the plaintiff may have a writ to the bishop. (*g*)

No one who is not charged as terre-tenant can disclaim (*h*), nor can the husband for his wife, nor can an infant disclaim. (*i*) In a writ against two jointenants, if one disclaims, the whole vests in the other, for the disclaimer is a disagreement to the purchase upon record (*k*). In formedon against two, if one disclaims, and the other makes default after default, the demandant shall recover the whole against him who made default, nor can the other tenant, where one disclaims, plead to the whole, without taking upon himself the entire tenancy. (*l*) When one tenant disclaims, and the other pleads non tenure, as the tenancy cannot vest in him who has pleaded non tenure, judgment must be, that the demandant take nothing by his writ, after which he may enter. (*m*) It is said, that in a writ against two, if one disclaims, the other cannot afterwards disclaim, for the tenancy cannot vest in nobody (*n*), but this reason would prevent a dis-

(*a*) Co. Litt. 362, b.

(*b*) Hunlock v. Petre, 3 Lev. 330.

(*c*) Thel. Dig. l. 11, c. 34, s. 3. Br. Ab. Discl. 36.

(*d*) Thel. Dig. l. 11, c. 34, s. 11, for the lands in this action are not to be recovered, and therefore, on disclaimer, the plaintiff could not enter.

(*e*) Br. Ab. Discl. 26. Thel. Dig. l. 11, c. 34, s. 7.

(*f*) Thel. Dig. l. 11, c. 34, s. 2.

(*g*) *Vide infra* in Pleas in bar in Qu. *Imp.*

(*h*) 11 H. 7, 14.

(*i*) Thel. Dig. l. 11, c. 34, s. 20.

(*k*) Thel. Dig. l. c. 34, s. 14. Townson v. Tickell, 3 B. and A. 31.

(*l*) Thel. Dig. l. 11, c. 34, s. 16.

(*m*) Thel. Dig. l. 11, c. 34, s. 17. Hunlock v. Petre, 3 Lev. 330. Br. Ab. Discl. 17.

(*n*) Thel. Dig. l. 11, c. 34, s. 15.

claimer where there is only a single tenant, and moreover, the disclaimer vests the freehold in the demandant. (*a*) The entry of the demandant after judgment upon a disclaimer will make a remitter. (*b*) If tenant for life disclaims and dies, the entry of the reversioner is not taken away. (*c*) Disclaimer.

When a tenant pleads entire tenancy, although he thus takes upon himself the freehold of the whole of the lands demanded, yet it is a good plea in abatement; and the reason, says C. B. Gilbert is, because he cannot dereign, or take advantage of his title to the freehold, in any other manner than as he then holds it. Hence also it is, that in such pleas the tenant must either shew a title or vouch over, as well as plead to the writ, because the tenant does not shew the necessity he has to use such plea, unless he pleads over; and he shall not merely answer the demand of the plaintiff, without shewing such necessity, since the mere shewing that he holds in another manner would not be sufficient to compel the plaintiff to begin again his demand, to lands which the defendant confesses he holds. (*d*) In a plea of entire tenancy therefore, the form is to plead the matter in abatement of the writ, and afterwards to state the matter in bar or to vouch, and it seems to be improper to conclude the matter in abatement with a prayer of judgment of the writ. (*e*) Where two tenants plead entire or several tenancy, and conclude with matter in bar, or with voucher, as they ought, the demandant must take issue on the entire or several tenancy, and must not plead to the matter in bar or the voucher, otherwise the writ will abate (*f*); but, where one tenant takes the entire tenancy upon himself, and the other pleads non tenure, or says nothing, the demandant cannot be compelled to maintain his writ against the latter, for it is sufficient if there is one tenant to the Entire tenancy.

(*a*) Br. Ab. Discl. 13, *quære* before entry.

(*b*) Co. Litt. 363, a.

(*c*) Br. Ab. Discl. 17. Judgment, 132.

(*d*) Gilb. Hist. C. B. 254. Booth, 33. 1 Lutw. 11, 12.

(*e*) Rast. Ent. 364, b, 365, a. Thel. Dig. l. 11, c. 31, s. 20. Br. Ab. Sev. Ten. 16, but in 1 Lutw. 11, the matter in abatement concludes with a prayer of judgment of the writ, and see Com. Dig. Abatem. (F. 13).

(*f*) Thel. Dig. l. 16, c. 7, s. 55. Fitz. Ab. Maint. *de br.* 56. Br. Ab. Sev. Ten. 16.

Entire tenancy.

writ. (*a*) In a writ against two, if one appears at the return of the grand cape, and the other makes default, he who appears may take the entire tenancy upon himself, and wage his law of non summons for the entirety, and the demandant may take issue upon the entire tenancy, but, if this issue be found for the tenant, he must still save his default. (*b*) After wager of law of non summons in common, no one can take the entire tenancy upon himself. (*c*)

In an action against several, each may take the entire tenancy upon himself (*d*); so one tenant may take the entire tenancy upon himself as to one part, and plead jointenancy or other plea as to another part. (*e*)

Several tenancy.

The plea of several tenancy differs very little from that of entire tenancy. Though pleaded in abatement it must still contain matter in bar or a voucher, but the matter in abatement only is traversable, and the demandant must maintain his writ. So it may be pleaded after the return of the grand cape, but not after the tenants have waged their law of non summons in common. (*f*) The matter in bar after the plea in abatement, must furnish a good bar, and therefore, if bad, may be demurred to. (*g*)

In general, several tenancy may be pleaded when several tenants in common are joined in one *præcipe quod reddat*, or other real action. (*h*) It seems that in a *nuper obiit* the tenants cannot plead several tenancy, on account of the privity of blood in this action, which only lies against coparceners (*i*); if the defendants are in fact tenants in common, they ought to disclaim in the blood, on which the demandant's writ will abate, and he will be compelled to sue them in a *mortd'ancestor*, in which action tenancy in severalty may be pleaded. (*k*) But if the coparceners claim by purchase, it is a good plea. (*l*) In assise of novel disseisin, several

(*a*) Thel. D. l. 16, c. 7, s. 54, l. 11. c. 22. s. 45. Br. Ab. Maint. de B. 15.

(*b*) Thel. Dig. l. 11, c. 33, s. 4. 7. Rast. Ent. 271, a.

(*c*) Thel. D. l. 11, c. 33, s. 12.

(*d*) Sav. 116. Br. Ab. Maint. de Br. 15.

(*e*) Thel. D. l. 11, c. 33, s. 5. 1 Lutw. 11.

(*f*) Thel. Dig. l. 11, c. 31. Com. Dig. Abatem. (F. 12). Br. Ab. Sev. Ten. 16.

(*g*) 12 H. 6. 4. Fitz. Ab. Sev. Ten. 19. Thel. D. l. 11, c. 31, s. 20. Com. Dig. Abatement, (F. 11).

(*h*) Thel. D. l. 5, c. 3, s. 1. *Ante*, p. 9.

(*i*) Fitz. Ab. Nup. Ob. 7. F. N. B. 197 F. but see Fitz. Ab. Sev. Ten. 3. Thel. D. l. 11, c. 31, s. 2, and Com. Dig. Abatement, (F. 12), *contra*.

(*k*) 16 H. 7. 1.

(*l*) F. N. B. 197 F.

tenancy is no plea, nor in an attaint or *scire facias* founded upon an assise, because, in assise, if one is found tenant, and the other has nothing, it is sufficient (*a*); but in an assise of *mortd'ancestor* it is a good plea, and the writ may abate, but not when one tenant is found tenant of the whole. (*b*) In a writ founded upon disseisin, as in a writ of entry in the *per*, several tenancy is not a good plea (*c*), nor is it in a *per quæ servitia* (*d*), nor in an action against husband and wife. (*e*) In a *cessavit* it is a good plea in abatement, that the tenant holds of several lords, or by several services, or this land with other land, by the same services. (*f*) Several tenancy.

It is said that where one tenant pleads several tenancy as to parcel, and the other tenant not, the writ can only abate for that parcel (*g*); but that when both the tenants plead several tenancy which is acknowledged, the whole writ shall abate. (*h*)

In general, such matters as may be pleaded in abatement to the person of the plaintiff, in personal actions, may be pleaded to the person of the demandant in real actions. Thus outlawry (*i*), and attainder (*k*), are good pleas in abatement, in real actions. (*l*) And so it may be pleaded, that the demandant is jointenant (*m*), or coparcener (*n*), with another not named, or that the demandant is a feme covert. (*o*) But in real actions, it cannot, in general, be pleaded in abatement, as it may in personal actions, that the demandant is tenant in common with a third person not named. (*p*) Alien born is a good plea in abatement in real actions. (*q*) To the person of the demandant.

(*a*) Br. Ab. Ass. 311. Sev. Ten. 20. Fitz. Ab. Sev. Ten. 1. 6. Thel. Dig. l. 11, c. 31, s. 32. 2 Leon. 8.

(*b*) Fitz. Ab. Sev. Ten. 2. Thel. Dig. l. 11, c. 31, s. 2.

(*c*) 2 Leon. 8.

(*d*) Fitz. Ab. Sev. Ten. 15. Thel. Dig. l. 11, c. 31, s. 5.

(*e*) Fitz. Ab. Sev. Ten. 10. Thel. Dig. l. 11, c. 31, s. 12.

(*f*) Thel. Dig. l. 11, c. 32.

(*g*) Thel. Dig. l. 11, c. 31, s. 21, Com. Dig. Ab. (F. 12), but see Fitz. Ab. Sev. Ten. 17, 18. Br. Ab. Sev. Ten. 12. Dect. Pl. 6.

(*h*) Thel. Dig. l. 11, c. 31, s. 7. Com. Dig. Ab. (F. 12).

(*i*) Co. Litt. 128, b. Outlawry cannot be pleaded in bar, in a real action. *Ibid.*

(*k*) Co. Litt. 130, a.

(*l*) Com. Dig. Abatem. (E. 2, 3, 4).

(*m*) See *ante*, p. 6. Com. Dig. Abatem. (E. 9).

(*n*) See *ante*, p. 8, and the distinctions. Com. Dig. Abatem. (E. 8).

(*o*) See *ante*, p. 8.

(*p*) See *ante*, p. 7.

(*q*) Co Litt. 29, b.

Non joinder of demandant.

In real, as in personal action, the non joinder of a person who ought to be joined as demandant, may be pleaded in abatement, but the omission will not furnish a ground of nonsuit at the trial.

Coparceners.

Where one coparcener sues without the other, to whom the right has descended from the same ancestor, the non joinder may be pleaded in abatement, and so if two parceners are disseised, they ought to join; but where they sue in several rights, they ought to have several actions, as if two parceners are disseised and die, their heirs ought to sue severally, for each has a several right. (*a*) So it is a good plea that land is departible by custom amongst the heirs male, and that the demandant has a brother not named, without saying amongst whom the land was parted (*b*); and in *mortd'ancestor*, it is a good plea that the demandant and tenant are coparceners. (*c*)

Jointenancy.

In all real and mixed actions, jointenants generally ought to join, for they have but one joint title, and one freehold (*d*), and, therefore, if one jointenant sues, the tenant may plead, that the demandant has nothing except jointly with such a one. (*e*)

Tenants in common.

In real and mixed actions, generally, tenants in common must sever, because they have several freeholds, and claim by several titles. (*f*) But where an entire thing is demanded, in a real or mixed action, there, from necessity, tenants in common must join (*g*), as in an assise for the service of a horse, and in a *quare impedit*, for the presentation is entire. (*h*)

Baron and feme.

In actions real, for the land of the wife, the husband and wife ought to join (*i*), and the non joinder may be pleaded in abatement.

Non joinder of tenant.

If a jointenant be sued alone, in a real action, he may plead, that he holds jointly with such an one, who is alive, and not named (*k*), and this plea may be pleaded to parcel of the land demanded (*l*), but the writ shall only abate for that parcel. (*m*)

Jointenancy.

(*a*) Co. Litt. 164, a. Com. Dig. Parc. (A. 6). Abatement, (E. 9). *Ante*, p. 8.

(*b*) Thel. D. l. 11, c. 26, s. 1, 2.

(*c*) Thel. D. l. 11, c. 26, s. 6.

(*d*) Litt. s. 311. Co. Litt. 189, a. 195, b. Com. Dig. Abatement, (E. 9).

(*e*) Thel. Dig. l. 11, c. 27, s. 15.

(*f*) Litt. s. 311. Co. Litt. 195, b. Curtis v. Brown, 2 Mod. 61.

(*g*) Co. Litt. 195, b. 197, a.

(*h*) Co. Litt. 197, b.

(*i*) Odill v. Tyrrell, 1 Bulstr. 21. Com. Dig. Bar. and Feme, (V).

(*k*) Com. Dig. Abatem. (F. 5). Gilb. Hist. C. B. 254. *Ante*, p. 9.

(*l*) Ast. Ent. 10. Dal. 75.

(*m*) Thel. Dig. l. 11, c. 29. Br. Ab. Jointen. 59, 66. Dal. 75, 106. Dyer, 291, a.

Where an entire thing, however, is demanded, as a manor, it seems that jointenancy of parcel will abate the whole writ. (*a*) In some other cases, also, jointenancy of parcel will abate the whole writ, as in a *formedon*, or assise, for a rent-charge; because, in a rent-charge demanded, it is necessary to name all the tenants of the land out of which the rent issues. (*b*) Four tenants cannot plead that two of them are jointenants with A. and B. not named. (*c*) If A. plead jointenancy with B., whereby the writ abates, to another writ against A. and B., they may plead jointenancy with D. (*d*) And a man may plead jointenancy with his wife. (*e*) Non joinder of tenant.

Although in a plea of non tenure, it is necessary to aver that the defendant was not tenant, the day of the writ purchased, or ever after, yet in a plea of jointenancy, it is sufficient to say, that the tenant held jointly with another not named, the day of the writ, without saying, *or ever after* (*f*); but it is necessary to state that the person who is averred to be jointenant is alive. (*g*) It is said, that when a tenant pleads jointenancy, he ought always to shew of whose gift the joint estate is, because jointenancy is always the act of the parties. (*h*)

Jointenancy is, in general, a good plea in a *præcipe quod reddat*, as in *formedon* (*i*), dower (*k*), writ of entry (*l*); or writ of right of advowson; and it is said, in a *darrein presentment* (*m*); in assise of land (*n*), or rent (*o*), in a *juris utrum* (*p*), in a *cessavit* (*q*), in waste against a guardian (*r*), and in a writ of partition, brought by a jointenant. (*s*) In an assise of rent service, jointenancy of the *rent* by the pernor, is a good plea; and in an assise of rent-charge, or rent-seck, jointenancy of the *land* may be pleaded. (*t*) In what actions.

(*a*) 2 Leon. 161. 3 Leon. 92; but see Dyer, 291, a. and Doctr. Pl. 7.
(*b*) Dyer, 31, b. 84, a. 45 Ass. 13.
(*c*) Holland v. Dauntzey, Cro. Eliz. 740.
(*d*) 39 Ed. 3, 36, a. Com. Dig. Abatement, (F. 5). Br. Ab. Jointen. 20.
(*e*) Thel. D. l. 11, c. 28, s. 2, 10, 12.
(*f*) Br. Ab. Nonten. 25. Booth, 32. Thel. D. l. 11, c. 28, s. 52.
(*g*) Com. Dig. Abatem. (F. 5). Thel. D. l. 11, c. 28, s. 28; but see s. 31.
(*h*) Dyer, 32, a. Vin. Ab. Jointenants, (E. 6); but see Lady Cobham v. Tomlinson. T. Jones, 6, for the tenants may be joint disseisors.
(*i*) Thel. D. l. 11, c. 28, s. 36.
(*k*) *Ibid.* s. 3, 8.
(*l*) *Ibid.* s. 11, 12.
(*m*) *Ibid.* s. 44, but see s. 16.
(*n*) *Ibid.* s. 15.
(*o*) *Ibid.* s. 41.
(*p*) *Ibid.* s. 5.
(*q*) *Ibid.* s. 10.
(*r*) *Ibid.* s. 38.
(*s*) Co. Ent. 413.
(*t*) Br. Ab. Jointenancy, 62. Dyer, 31, b. See *ante*, p. 65.

Non joinder of tenant.

In a writ of *deceit*, brought against the party who recovered in a former action, and his feoffee, the latter may plead jointenancy. (*a*)

On a general writ of *scire facias* against the heir and terre-tenants, if some of the terre-tenants only are summoned, they may plead that there are other terre-tenants not named, in the *same* county, and pray judgment if they ought to answer *quousque* the others be summoned, but ought not to pray *quod breve cassetur*, for the court ought never to abate the writ, but where the plaintiff can have a better writ (*b*); but upon a special writ, if all the terre-tenants are not named in it, those who are may plead in abatement, for there the plaintiff may have a better writ by naming them all. (*c*) And it seems to be a good plea, that there are other tenants not named, in another county. (*d*)

Replication.

At common law, if the tenant had pleaded jointenancy by deed or fine, with one not named, and had brought the deed or fine into court, the defendant was not suffered to aver sole tenancy in reply to this plea, but his writ immediately abated. To remedy this, the statute *de conjunctim feoffatis*, 34 Ed. 1, st. 1, was passed, by which in assises of *novel disseisin*, *mortd'ancestor*, *juris utrum*, and other writs where tenements are demanded at the first day in court, if the tenant alleges that he holds jointly with his wife or a stranger, and shews a deed testifying the same, the demandant may aver that he was sole tenant the day of the writ purchased, and the justices of assise shall summon, as well the person absent, as the present tenant, to answer upon a day certain, as well to the plea, as to the lands demanded and put in view. (*e*) But though the demandant could not at common law have averred sole tenancy in reply, yet he might have confessed and avoided the plea. (*f*) The statute does not extend to jointenancy by fine, which remains as at common law (*g*); nor, as it seems, to jointenancy by will. (*h*) The process upon this statute to bring in the jointenant is a *scire facias* (*i*), which may, it is said, issue, although the demandant has

(*a*) Thel. D. l. 11, c. 28, s. 17. Fitz. Ab. Deceit, 8.

(*b*) Adams v. Terret. of Savage, 2 Salk. 601. 2 L. Ray. 1253. 3 Salk. 321. S. C. 2 Tidd. 1166. (7th edit.)

(*c*) *Id. Ibid.*

(*d*) Prynne v. Sloughter, 2 Vent. 104.

(*e*) Com. Dig. Abatem. (E. 5). Vir. Ab. Jointen. (A. b). Booth, 31.

(*f*) Br. Ab. Jointen. 64.

(*g*) Br. Ab. Jointen. 22. 2 Leon. 161.

(*h*) Br. Ab. Jointen. 45.

(*i*) Rast. Ent. 66, b. 415, b.

not replied (*a*), but no process goes upon the statute, unless a freehold be demanded. (*b*) If the tenant pleads a false plea under the statute *de conjunctim feoffatis*, he is liable to fine and imprisonment. (*c*) Non joinder of tenant.

The usual replication to a plea of jointenancy, is, that the tenant or defendant is sole tenant, with a traverse of the jointenancy. (*d*) And, in partition, the replication is, that the tenant and plaintiff hold jointly, with a traverse that any other holds with them. (*e*) So the plaintiff may confess and avoid the plea, as by alleging that he was seised until disseised by A., who enfeoffed the tenant and another, upon whom the demandant entered, and was disseised by the tenant alone (*f*); but a disseisin or abatement in the feoffor ought to be suggested, for a bare entry is not sufficient. (*g*)

Jointenancy cannot be pleaded after a general imparlance. (*h*)

If one parcener be sued in a real action, she may plead, that there is another coheir not named; although the parceners are in by several descents. (*i*) Coparceners.

In all actions in which the inheritance or freehold is demanded, or ought to be recovered, if the husband is seised jointly with his wife, by purchase, before or after marriage, and the wife is not joined, the tenant may plead the non-joinder in abatement; and so if the husband holds in coparcenery with his wife, without partition made before marriage, or if the land descends to them in coparcenery after marriage, or if the husband is seised in right of his wife. (*k*) Baron and feme.

In real actions it may be pleaded in abatement of the writ, that since the last continuance the demandant died. (*l*) But by statute 17 Car. 2, c. 8, in no action, real, personal, or mixed, shall the death of either party, between the verdict and judg- Death of sole demandant.

(*a*) Thel. Dig. l. 11, c. 28. s. 3.
(*b*) Thel. D. l. 11, c. 28, s. 37.
(*c*) Com. Dig. Abatement, (F. 5). Vin. Ab. Jointen. (A. b).
(*d*) Ast. Ent. 393. Com. Dig. Abatem. (F. 5). East. Ent. 66, b. F. Jones, 6.
(*e*) Co. Ent. 413, a.
(*f*) Thel. D. l. 11, c. 28, s. 46.
(*g*) *Ibid.* s. 48.
(*h*) Hetl. 142. Dyer, 210, b. But see Keilw. 93, b.
(*i*) Thel. D. l. 5, c. 1, s. 7. Com. Dig. Abatement, (F. 4).
(*k*) Thel. D. l. 5, c. 4, s. 1. Com. Dig. Abatem. (F. 7.) Baron and Feme, (Y.)
(*l*) Com. Dig. Abatem. (H. 32). Ast. Ent. 8.

Death of sole demandant.

ment, be error, so as judgment be entered within two terms after verdict.

Death of one of the demandants.

In all real actions, the death of one of the demandants, since the last continuance, may be pleaded in abatement (*a*), unless the cause of action survive, as if the action be brought by two joint-tenants, or by two coparceners, and one of the coparceners dies without issue, in which case it may be contended, that the writ shall not abate, by statute 8 and 9 W. 3, c. 11, s. 7. (*b*)

In real actions, at common law, the writ will abate on the death of one of the demandants, even although he has been summoned and severed, and although the thing in demand will survive (*c*); and the reason given is, because the nature of the demandant's demand is changed, and instead of going for a moiety, he now claims the whole, and the writ, it is said, cannot have this double effect. (*d*)

But in those writs in which, if they be abated, the plaintiff would not be entitled to another writ, the death of one of the plaintiffs shall not be pleaded in abatement; thus in a *quare impedit*, after a plenarty and six months passed, or when a lapse will incur, the death of one plaintiff will not abate the writ, for otherwise the surviving plaintiff might wholly lose the turn. (*e*)

Death of sole tenant.

The death of a sole tenant, since the last continuance, may be pleaded in abatement, but if he die after verdict, and before judgment, this is aided by statute 17 Car. 2, c. 8. (*f*) And the writ does not abate by the death of the defendant in error upon a judgment in dower, but a *sci. fa.* shall go against her executors, to reverse the judgment of damages (*g*); but where, by the

(*a*) Bendl. pl. 74. Com. Dig. Abatem. (H. 33).

(*b*) See Read and Redman's case, 10 Rep. 134, a. Gilb. Hist. C. B. 245, and *quære*.

(*c*) Read and Redman's case, 10 Rep. 134, a.

(*d*) Gilb. Hist. C. B. 244. Bac. Ab. Abatement, (F).

(*e*) Read and Redman's case, 10 Rep. 134, b. Half's case, 7 Rep. 26, b.

(*f*) Com. Dig. Abatem. (H. 34).

(*g*) Bromley v. Littleton, Yelv. 112.

writ of error, the plaintiff is to be restored to his lands, the death of one of the defendants was held to abate the writ. (*a*)

Death of sole tenant.

The death of one of several tenants, in a real action, will in general abate the writ (*b*), unless the cause of action survive against the surviving tenant, in which case, the statute of 8 and 9 W. 3, c. 11, seems to apply. In some actions, indeed, before that statute, the death of one defendant did not abate the writ, as in assise of *novel disseisin*, or *mortd'ancestor*, against jointenants. (*c*) And so in assise against two disseisors if one of them dies, and there is a tenant of the freehold. (*d*) So in a *quare impedit*, the death of one of the defendants will not abate the writ (*e*), and so also in a writ of partition, by stat. 8 and 9 W. 3, c. 31, s. 3.

Death of one of several tenants.

In general, the writ will not abate by the death of one who is a stranger to it, unless by such death no cause of action remains in the demandant. (*f*) Nor will a writ abate by the death of the vouchee, tenant by receit, or prayee in aid. (*g*)

Death of a stranger.

The tenant may plead, that the demandant himself was seised on the day of the writ purchased (*h*); and this plea may be pleaded either in abatement or in bar, at the option of the tenant (*i*); or that the demandant was seised of parcel (*k*); and if an entire thing be demanded, as an advowson or manor, such a plea as to parcel will abate the whole writ. (*l*) In assise for rent-

The demandant himself seised.

(*a*) Hobby's Case, Godb. 66, 68.

(*b*) R. v. Dryden, Cro. Car. 574, 585, 586, 589. Com. Dig. Abatem. (H. 35). Vin. Ab. Abatem. (M. a). Doctr. Pl. 6.

(*c*) Thel. D. l. 12, c. 2, s. 5. Cro. Car. 574.

(*d*) Thel. D. l. 12, c. 2, s. 4. R. v. Dryden, Cro. Car. 574.

(*e*) Hall's case, 7 Rep. 26, b. Dyer 194, b.

(*f*) Thel. D. l. 12, c. 10. Com. Dig. Abatem. (H. 36). Vin. Ab. Abatem. (P. a).

(*g*) Thel. D. l. 12, c. 3, c. 4, c. 5. Com. Dig. Abatem. (H. 37).

(*h*) Thel. D. l. 11, c. 35, s. 1, 4, 18. Vin. Ab. Abatem. (E). Com. Dig. Abatem. (F. 16).

(*i*) Thel. D. l. 11, c. 35, s. 20. Fitz. Ab. Brief. 244.

(*k*) Thel. D. l. 11, c. 35, s. 4, but *quære* whether it will abate the whole writ, s. 17.

(*l*) Thel. D. l. 11, c. 35, s. 17.

The demandant himself seised.

charge, it is a good plea, that the plaintiff was seised of the land out of which, &c. (*a*); but in an assise for rent-service, the writ shall not abate, although the demandant was seised of parcel of the land out of which, &c.; and such a plea in *formedon* of rent-service, is a plea to the action for the portion, and not to the writ. (*b*) In dower *unde nihil habet*, seisin of the demandant is not a good plea, unless she has parcel of her dower by the assignment of the tenant himself, in the same town. (*c*)

Entry pending the writ.

If the demandant in a real action does certain acts, inconsistent with the pursuit of the remedy which he has adopted, such acts may be pleaded in abatement of the writ; thus, if he disseise the tenant, the writ will abate (*d*); for that act shews a determination not to await the decision of the law: or if he enter into the whole, or parcel, pending the writ. (*e*) Entry into parcel, as it seems, will abate the whole writ. (*f*) The entry must be such an entry as will make the demandant tenant of the land, and, therefore, if he enter without claiming any thing, the writ will not abate (*g*), and the tenant ought to shew how the demandant entered, and at what time (*h*), and into what parcel in certain (*i*), and the plea may be pleaded *puis darrein continuance*. (*k*) The demandant may reply, that the tenant re-entered, and is now tenant. (*l*)

Pursuit of other remedy.

So if the plaintiff pursues some other remedy for the recovery of thing in demand, the writ will abate, as if during an assise for rent, he distrains for it (*m*); or during an assise of common of

(*a*) Thel. D. l. 11, c. 35, s. 9.
(*b*) Thel. D. l. 11, c. 35, s. 3.
(*c*) Com Dig. Abatem. (F. 16). St. W. 2, c. 49. 2 Inst. 263.
(*d*) Thel. D. l. 12, c. 21, s. 3, 11. Com. Dig. Abatem. (H. 47).
(*e*) Thel. D. l. 12, c. 21. Com. Dig. Abatem. (H. 48).
(*f*) Thel. D. l. 12, c. 21, s. 10. 17, 21. Doct. Pl. 5. 1 Lutw. 38.
(*g*) Plowd. Com. 92, 93. E. of Shrewsbury v. E. of Rutland, 2 Browal. 231.
(*h*) 1 Lutw. 39.
(*i*) Hawkins v. Moore, Cro. Jac. 261.
(*k*) *Ibid.*
(*l*) Thel. D. l. 12, c. 21, s. 22. Com. Dig. Abatem. (H. 48).
(*m*) Thel. D. l. 12, c. 23, s. 1. Com. Dig. Abatem. (H. 50).

pasture, uses the common (*a*); or during an assise of nuisance, abates the nuisance (*b*); or, if pending one *quare impedit*, he brings another, in which case the latter shall abate. (*c*)

Pursuit of other remedy.

Whenever a tenant makes default, and the demandant insists upon the default, and it is saved by the tenant, the writ shall abate (*d*); but where there are several tenants, and some of them only save their default, the writ shall only abate for their portions. (*e*)

By saver default.

If land be recovered against the tenant by a stranger pending the writ, it will abate. (*f*) And a recovery of parcel abates the the writ for that part. (*g*) So a recovery by the tenant against the demandant himself, by default, may be pleaded. (*h*) The recovery must be against the tenant himself, and not against a stranger (*i*); and it must be pleaded, that execution has been sued. (*k*) And it seems, that it cannot be pleaded, where the recovery was by render, default, or *nihil dicit*, on a writ brought after the first writ. (*l*) The demandant may reply, that the tenant was tenant the day of the writ purchased, and still is (*m*); or that the recovery was by collusion. (*n*)

Recovery against the tenant.

If the estate of the demandant, which entitles him to recover, determines pending the writ, it may be pleaded in abatement, as in an action of waste by tenant in tail, if he becomes tenant in tail after possibility, pending the writ. (*o*)

Estate determined pending the writ.

(*a*) Thel. D. l. 12, c. 24.
(*b*) *Ibid.* c. 25.
(*c*) Earl of Bedford v. Bp. of Exeter, Hob. 137.
(*d*) Thel. D. l. 12, c. 28. *Ante*, p. 171.
(*e*) Thel. D. l. 12, c. 27, s. 3, 10, 11, 15, and see *ante*, p. 171.
(*f*) Thel. D. l. 12. c. 30. Com. Dig. Abatem. (H. 54). Vin. Ab. Abatem. (L).
(*g*) Thel. D. l. 12, c. 30, s. 2.
(*h*) *Ibid.* s. 7.
(*i*) *Ibid.* s. 3.
(*k*) *Ibid.* s. 22, for before execution the freehold is not transferred.
(*l*) *Ibid.* s. 11, 16, 17, 18, 29.
(*m*) *Ibid.* s. 31.
(*n*) *Ibid.* s. 6.
(*o*) Athowe v. Herring, 1 Rol. R. 82. Com. Dig. Abatem. (H. 56). and see *ante*, p. 109.

Darrein seisin.

As the courts have refused to grant oyer of an original writ, such pleas in abatement, as cannot be pleaded without oyer, are now obsolete; but, if the mistake in the writ be carried also into the declaration, it is then open to the defendant to plead in abatement of the writ. (*a*) In real actions, therefore, an incorrect statement of the demandant's title in his count may still be pleaded in abatement.

In all real actions in which the form of the action depends upon the circumstance of a certain person being the person who was last seised of the tenements in demand, *darrein seisin*, or the later seisin of another person, which, if true, would shew that the demandant has mistaken the form of his writ, is a good plea. Thus, in a *nuper obiit*, on the seisin of the father, it may be pleaded, that the brother entered after the death of the father, and died seised. (*b*) So in a *mortd'ancestor*, that the demandant himself was seised after the death of the ancestor (*c*), for, in that case, the demandant ought to have an assise, ejectment, or other possessory remedy not ancestral; and so when a writ of entry is brought for rent, on a disseisin done to the father of the demandant, it is a good plea, that the demandant himself was seised of the rent after the death of his father. (*d*) And wherever *darrein seisin* shews that the demandant has wrongly deduced his title it is a good plea, for it is a rule of law, that every one must make himself heir to him who was last seised. Thus, in a writ of cosinage, the seisin of another ancestor after the death of the cousin, on whose seisin the plaintiff claims, is a good plea (*e*), although another writ of *cosinage* must be brought upon the seisin of the former ancestor. In escheat, *darrein seisin* is a good plea. (*f*) It seems doubtful whether it is a good plea in a writ of right (*g*), and the reason given against such a plea is, that the tenant may tender the demi-mark, and have the ancestor's seisin inquired into. In formedon in the descender *darrein seisin* is, as it seems, a good plea. (*h*)

(*a*) 1 Chitty's Pl. 439.

(*b*) Thel. Dig. l. 11, c. 40, s. 1. Fitz. Ab. *Nup. Ob.* 6. Doctr. Pl. 6. Com. Dig. Abatem. (H. 25).

(*c*) Thel. Dig. l. 11, c. 40, s. 7.

(*d*) Thel. Dig. l. 11, c. 40, s. 15. Co. Litt. 238, b.

(*e*) Thel. Dig. l. 11, c. 40, s. 4.

(*f*) Thel. Dig. l. 11, c. 40, s. 14.

(*g*) 11 H. 7, 3, b. Thel. Dig. l. 11, c. 40, s. 18. Vin. Ab. *Dr. de recto*, (E). Com. Dig. Abatem. (H. 25). Doct. Pl. 6.

(*h*) Br. Ab. Formedon, 29. Buckmere's Case, 8 Rep. 88, b, but see Doct. Pl. 6. Dyer, 291.

Darrein seisin.

Darrein seisin, without any title stated in the tenant, is a plea in abatement, but, with a title, it may be pleaded in bar to the action. (*a*)

Darrein presentment.

In a *quare impedit* or assise of *darrein presentment*, *darrein presentment* by another ancestor of the tenant, or by himself, without title alleged, is a good plea to the writ. (*b*)

Mistake of the descent.

In those real actions in which it is necessary to state a title in the count, in which title a descent is conveyed from some ancestor of the demandant, a mistake in deducing the title may be pleaded in abatement, for such a plea shews that the demandant has misconceived his title, and consequently his remedy. Thus, in a formedon in the descender, in which, as we have seen (*c*), it is necessary to make mention of all the ancestors of the demandant who have been seised by force of the entail; if one of them be omitted, such omission may be pleaded in abatement (*d*); and so in a formedon in the reverter or remainder, a similar mistake in the pedigree of the heir of the donor, or of him in the remainder will abate the writ, but it is otherwise in the pedigree on the part of the donee. (*e*) The omission of the eldest son, who did not survive the father, is not material (*f*), nor as it seems, though he did survive, unless he was seised by force of the entail (*g*), and the omission, in the descent, of an alien, will not abate the writ: (*h*) In a formedon, as cousin and heir, it may be pleaded in abatement, that the demandant has not shewn ***how cousin*** (*i*) or the tenant may demur. (*k*)

Mistake in the demise.

So if a demise which forms part of the demandant's title to recover be mis-stated, the error may be pleaded in abatement. Thus, in a writ of entry in the *post*, if the demandant says that

(*a*) Thel. Dig. l. 11, c. 40, s. 7. Com. Dig. Abatem. (H. 25).

(*b*) Thel. Dig. l. 11, c. 41, s. 1, 3. Com. Dig. Abatem. (H. 26). See *post*, title "Pleas in Bar," in *Quare impedit*.

(*c*) See *ante*, p. 56.

(*d*) Thel. Dig. l. 11, c. 50, s. 1, 12. Buckmere's Case, 8 Rep. 88, a, b. Com. Dig. Abatem. (H. 27).

(*e*) Buckmere's Case, 8 Rep. 88, a. *Ante*, p. 60.

(*f*) *Ibid.*

(*g*) Dinghurst v. Batt, 3 Lev. 218, but it is better to name him. *Ante*, p. 56.

(*h*) Thel. Dig. l. 11, c. 50, s. 15. Co. Litt. 8, a.

(*i*) Co. Ent. 320, a. Com. Dig. Abatem. (H. 27).

(*k*) Dumsday v. Hughes, 3 B. and P. 453. *Ante*, p. 177.

Mistake in the demise.

the tenant had no entry, but, after a demise made by A. to B. *ne lessa pas* is a good plea. (*a*) So in an action of waste, a mistake in the demise may be pleaded in abatement, as in waste against husband and wife on a demise, supposed to be made to both, it may be pleaded, that the demise was to the husband alone (*b*); and in waste upon a demise by the plaintiff's brother, that the demise was made by his father, and confirmed by his brother (*c*); but, if two jointenants make a lease, and one of them dies, in an action by the survivor, it is not a good plea that the lease was made by the plaintiff and his cotenant (*d*); and, if two parceners lease, and one of them dies without issue, the other shall have waste, supposing the demise from himself only. (*e*) So if waste is brought upon the plaintiff's own demise, if the defendant pleads that the plaintiff and three others demised, reserving the reversion to the four and their heirs, the plaintiff may reply, that the three released to him and his heirs. (*f*)

Mistake in the estate.

If the demandant, in his count, mistake the estate either of himself or of the tenant, this also may be pleaded in abatement; thus, if a tenant in tail bring a writ of right, it may be pleaded in abatement, that the demandant had nothing on the day of the writ purchased, except to him and the heirs of his body (*g*), so if he bring a writ of cosinage (*h*), so in waste, where the plaintiff entitles himself to a fee by descent, it may be pleaded, that he has an estate tail by devise. (*i*) It is the same if the demandant mistake the estate of the tenant, as in waste against one as tenant in dower, it may be pleaded, that she held by gift to her and her former husband in frankmarriage. (*k*)

Mistake in the entry.

So also if the demandant mistake the entry supposed to have been made by the tenant; thus in a writ of entry for lands

(*a*) Thel. Dig. l. 11, c. 52, s. 2. Fitz. Ab. Brief, 820. Ent. 65, 71. Com. Dig. Abatem. (H. 28).
(*b*) Thel. Dig. l. 11, c. 52, s. 12. Com. Dig. Abatem. (H. 28).
(*c*) Thel. Dig. l. 11, c. 52, s. 14.
(*d*) Thel. Dig. l. 11, c. 52, s. 3, 11.
(*e*) Thel. Dig. l. 11, c. 52, s. 18. Com. Dig. Abatem. (H. 28).
(*f*) *Ibid.*
(*g*) Thel. Dig. l. 11, c. 44, s. 3. Com. Dig. Abatem. (H. 29).
(*h*) Thel. Dig. l. 11, c. 44, s. 7.
(*i*) 2 Lutw. 1557.
(*k*) Thel. Dig. l. 11, c. 53, s. 3.

into which the tenant had not entry till after a disseisin which H. made to the ancestor of the demandant, it may be pleaded, that he entered as son and heir to H., and so the demandant might have had a writ of entry within the degrees. (*a*)

Mistake in the entry.

There is in certain real actions a proceeding so analogous to a plea in abatement, that it may, without impropriety, be classed under the same head. When an infant demandant sues, or an infant tenant is sued, in cases where his title is founded on a descent, the tenant may, in the first case, pray that the parol may demur until the demandant attains his age, and, in the second, may plead his own infancy, and have his age. (*b*) When the parol demurs on account of the non age of the demandant, it need not be pleaded (*c*), but the tenant must *plead* his own infancy, though it is said that such plea need not be verified by affidavit. (*d*)

Parol demurrer.

The granting that the parol shall demur, is for the benefit and in favour of the infant (*e*), and, therefore, that delay is not allowed, unless, in presumption of law, the demandant derives some benefit by it. Thus, in all actions ancestral droitural, where *a bare right* descends to the infant from his ancestor, the parol shall demur, because the law presumes that the infant has not sufficient knowledge of his case to conduct the action successfully. (*f*) But, in actions ancestral possessory, as in a writ of aiel, &c. it seems, that at common law the tenant could not have prayed that the parol demur (*g*), though, if in such actions ancestral possessory, the tenant had pleaded a plea which shewed that nothing, or only a bare right descended to the infant, the tenant might have prayed that the parol demur, because the case then became similar to that of an infant bringing an action ancestral droitural. (*h*) The delay which was incurred in case the tenant pleaded such a plea, and prayed that the parol demur, was remedied by the statute of Gloucester, by which parol

(*a*) Thel. Dig. l. 11, c. 54, s. 17, 22. Com. Dig. Abatem. (H. 30.)

(*b*) Vin. Ab. Age. Com. Dig. Enfant, (D.) Markal's case, 6 Rep. 3, a. Bing. on Inf. 128.

(*c*) Markal's Case, 6 Rep. 3, b.

(*d*) Ford v. Odam, Barnes, 267, but quære, for it is a dilatory plea, Derisley v. Custance, 4 T. R. 77.

(*e*) Markal's case, 6 Rep. 3, b.

(*f*) *Ibid.* Basset's case, Dyer, 137, a.

(*g*) Basset's case, Dyer, 137, a.

(*h*) Markal's case, 6 Rep. 4, a. Com. Dig. Enfant, (D. 1). 2 Inst. 291.

Parol demurrer.

demurrer is taken away in actions of cosinage, aiel, besaiel, &c. and in assises of *mortd'ancestor*. (*a*)

In the following actions the tenant may pray that the parol demur, on the ground of a naked right only descending to the demandant. In a writ of right, on the seisin of the ancestor. (*b*) In formedon in the reverter. (*c*) In a *dum fuit non compos mentis*, and *dum fuit infra ætatem*. (*d*) In a writ of entry *sur disseisin* by the heir of the disseisee, unless it is brought in the *per*, in which case parol demurrer is taken away by the stat. of West. 1, c. 47. (*e*)

In a formedon in the descender the parol shall not demur, but, if the tenant plead such a plea that the demandant cannot try it during his non age, the parol shall demur, as if he plead a feoffment with warranty and assets (*f*), and in other actions where a similar plea is pleaded the parol may demur, as in a *quid juris clamat*, and writ of waste. (*g*)

The parol shall not demur in a formedon in the remainder, because the ancestor was never seised, nor took the esplees, and cannot therefore have lost the possession, and have left a right to descend. (*h*)

But, in all real actions generally, which an infant brings on his own possession, although he has the land by descent, and, although the tenant pleads the deed or warranty of his ancestor, the parol shall not demur. Thus, in a writ of right, on a deforcement to the infant himself, and in a writ of *escheat, cessavit*, or right *sur disclaimer*, where the infant has had the seignory in possession, which by *escheat, cessavit*, or disclaimer, he has lost, and his ancestor had not any right to the land, the parol shall not demur. (*i*) And by the stat. of West. 1, c. 47, in a writ of entry *sur disseisin* by the heir of the disseisee, when brought in the *per*, the parol shall not demur. (*k*) And in an assise the parol shall not demur, because it is brought upon the plaintiff's own possession. (*l*)

(*a*) 2 Inst. 290, 1. Vin. Ab. Age, (A. 2). Markal's case, 6 Rep. 4, a.
(*b*) Markal's case, 6 Rep. 3, b.
(*c*) *Ibid.*
(*d*) *Ibid*, 4, a.
(*e*) 2 Inst. 257. Markal's case, 6 Rep. 4, b.
(*f*) 1 Rol. Ab. 137, l. 10, 141, l. 12. 2 Inst. 291.
(*g*) Markal's case, 4, a, b.
(*h*) Markal's case, 6 Rep. 3, a, 4, b. Dyer, 137, b.
(*i*) Markal's case, 6 Rep. 3, b. Dyer, 137, b.
(*k*) Dyer, 137, a. 2 Inst. 257. Vin. Ab. Age, (A. 3).
(*l*) 1 Rol. Ab. 141, l. 48, 138, l. 17.

Parol demurrer.

There are also some actions in which for special reasons the parol will not demur for the non age of the demandant, as in a *quare impedit*, for fear of a lapse (*a*), and in a writ of dower, on account of the wife's subsistence (*b*), and in a *nuper obiit*, by reason of the privity of blood. (*c*)

When the tenant shall have his age.

In most real actions at common law the tenant may plead his infancy, and the parol will demur till his full age. (*d*) But the tenant cannot have his age in an action brought on his own wrong, as in a *cessavit* on his own cesser (*e*), and in an *estrepement* for waste, which is in the nature of trespass (*f*), nor can the tenant have his age in a *nuper obiit*, on account of the privity of blood (*g*), nor in a partition, because the demandant and tenant are both in possession (*h*), nor in a writ of dower, and, if judgment is given against an infant tenant by default, it is no error. (*i*) But, where the feme bars her dower by fine, and afterwards brings error, the tenant, if terre-tenant, shall have his age. (*k*) In a writ of deceit or attaint the infant cannot have his age, for fear of the death of the summoners and viewers in the one case, and of the jurors in the other. (*l*) In a writ of entry *sur disseisin* in the *per*, the tenant cannot have his age by stat. West. 2, c. 47. (*m*)

In a writ of error brought against the heir of a recoveror who is in by descent and is terre-tenant, he shall have his age. (*n*)

An infant who is in by purchase, shall not have his age (*o*), nor when he is in as special occupant. (*p*) The parol shall de-

(*a*) 1 Rol. Ab. 138, l. 5. Harbert v. Bynion, 3 Bulstr. 142.

(*b*) 1 Rol. Ab. 137, l. 37. Harbert v. Bynion, 3 Bulst. 141. Cro. Jac. 393, S. C.

(*c*) 1 Rol. Ab. 143, l. 16. Br. Ab. Age, 77. Markal's case, 6 Rep. 4, b.

(*d*) Markal's case, 6 Rep. 4, b, and so in Equity. Chaplin v. Chaplin, 3 P. Wms. 368.

(*e*) Markal's case, 6 Rep. 4, b, but see Conny's case, 9 Rep. 85, a.

(*f*) 2 Inst. 328. Dyer, 104, b.

(*g*) Markal's case, 6 Rep. 4, b.

(*h*) *Ibid.* Co. Litt. 171, a.

(*i*) Smith v. Smith, Cro. Jac. 11. Dyer, 104, margin. Moor, 847.

(*k*) Herbert v. Binion, Cro. Jac. 392. Moor, 847, S. C.

(*l*) *Ibid.* 3 Bulst. 136, 141, S. C.

(*m*) 2 Inst. 257. Vin. Ab. Age, (A. 3).

(*n*) Sir Fortescue Aland v. Mason, 2 Str. 861. Fitz. Ab. Age, 16. Markal's case, 6 Rep. 4, b.

(*o*) 1 Rol. Ab. 143, l. 37. Vin. Ab. Age, (G).

(*p*) Chaplin v. Chaplin, 3 P. Wms. 368.

When the tenant shall have his age.

mur on account of the non age of an infant vouchee, who is bound to warranty by the deed of his ancestor, and, if two coparceners in gavelkind are vouched as one heir, the parol shall demur for the non age of the youngest if he is seised, although he is vouched only on account of his possession. (*a*) So the parol may demur on account of the non age of the prayee in aid, or of the tenant by receit. (*b*) By the stat. of Westminster 2, c. 40, where the husband aliens his wife's land, and the wife or her heir brings an action for the same against the alienee of the husband, the parol shall not demur, on account of the non age of the heir who is vouched. (*c*)

If the tenant pleads his infancy it may be counterpleaded by the demandant, who may allege that the tenant is in by purchase (*d*), or that he has attained his full age. (*e*) The issue of infancy or full age is tried by inspection, and not by the country (*f*), and a *venire facias* issues to bring the tenant into court. (*g*) If the tenant has his age, the entry is, that the suit remain or demur until the full age of the tenant, when the demandant may have a resummons, and proceed in the action. (*h*)

It seems, that the defendant, if he intends to plead his infancy, should do so within the time limited for pleading in abatement, as it is a dilatory plea. (*i*)

(*a*) 1 Rol. Ab. 144, l. 46. Vin. Ab. Age, (I).

(*b*) 1 Rol. Ab. 145, l. 18, 43. Vin. Ab. Age, (K).

(*c*) 2 Inst. 455. Vin. Ab. Age, (I). See further as to the parol demurring against all for the infancy of one, and for all in respect of part, Vin. Ab. Age, (N), (O).

(*d*) Vin. Ab. Age, (M).

(*e*) Ford v. Odam, Barnes, 267.

(*f*) Vin. Ab. Age, (Q).

(*g*) Rast. Ent. 26, a. Case of Abbot of Strata Marcella, 9 Rep. 31, a.

(*h*) Rast. Ent. 360, b.

(*i*) Derisley v. Castanee, 4 T. R. 77, but see Barnes, 267, and Sir J. F. Aland v. Mason, 2 Str. 863.

Of Pleas in Bar.

UNDER the present head the application of certain pleas to real actions in general will be first considered, and afterwards, the pleas proper to each of the most important real actions.

By statute, 4 Anne, c. 16, s. 4, 5, the tenant in a real action may plead several pleas by leave of the court.

Accord and satisfaction. Accord and satisfaction, in general, is not a good plea in real actions; or when the action is in the realty or mixed with the realty. (*a*) But where nothing but amends is to be recovered in damages, accord is a good plea, as in waste in the *tenuit*. (*b*)

Tout temps prist. The plea of *tout temps prist* can only be pleaded in bar of damages in a writ of dower *unde nihil habet*, and is allowed in that action, because the heir, who is tenant, holds by title, and is guilty of no wrong, till a demand be made. But in a writ of *aiel, cosinage*, or other action in which land and damages are to be recovered, such a plea is not good, for the tenant is in by wrong. (*c*) The plea of *tout temps prist* in dower, entitles the demandant to seisin of the land immediately. (*d*)

Judgment recovered. A bar in a real action, by judgment on demurrer, confession, verdict, &c. is a bar to any other action of the like nature for the same thing, which is the case likewise in personal actions (*e*), but in personal actions, the bar is perpetual, and the defendant has no remedy but by error or attaint. In real actions on the

(a) Vernon's case, 4 Rep. 1, b. Blake's Case, 6 Rep. 43, b.
(b) Peytoe's case, 9 Rep. 78, b. Blake's case, 6 Rep. 44, a.
(c) Co. Litt. 33, a.
(d) See *post*.
(e) Ferrer's case, 6 Rep. 7, a. Com. Dig. Action, (K. 1). (K. 3).

Judgment recovered.

contrary, if a man is barred by judgment in one action, he may bring another of a higher nature, and try the same right again. Thus if barred in an assise of novel disseisin, yet upon shewing a descent or other special matter, he may have an assise of *mortd'ancestor*, a writ of *aiel* or *besaiel*, or of entry *sur disseisin* to his ancestor. (*a*) So if a man is barred in a formedon in *descender*, yet he may have a formedon in *reverter* or *remainder*, for that is an action of a higher nature, and in which the fee-simple is to be recovered. (*b*) But a recovery in assise is a bar in every other assise, and in a writ of entry in nature of an assise, for they are both brought upon the plaintiff's own possession and are of the same nature, and a judgment in a writ of *aiel* is a bar in a writ of *besaiel* or *cosinage*, for they are both ancestral actions of the same nature. (*c*) In *formedon in descender*, if the demandant is barred by verdict or demurrer, yet the issue in tail may have a new formedon in descender (*d*), unless the bar was by warranty and assets (*e*).

If a demandant is barred in a real action, he may have another action for a collateral right, as a wife barred in assise may have a writ of dower (*f*), and a judgment in a real action against a person having only a qualified right, as a parson or prebendary, is no bar to the successor. (*g*)

Release.

A release *of all actions real*, discharges actions real or mixed (*h*), but a release of all *actions* does not operate as a release of a right of entry. (*i*) The release ought to be made to the tenant of the land (*k*); but it is good if made by the demandant to one who is tenant in law to him, by voucher, receit, or aid prayer. (*l*) A remainderman, a feoffee, or other not privy, cannot plead a release of actions to tenant for life. (*m*) If a release

(*a*) *Ibid.* Doctr. Pl. 65.

(*b*) Ferrer's case, 6 Rep. 7, b. Robinson's case, 5 Rep. 32, b. Doctr. Pl. 65.

(*c*) Ferrer's case, 6 Rep. 47, b.

(*d*) *Ibid.* Within the time limited by 21 Jac. 1, c. 16. *Ante*, p. 14.

(*e*) Co. Litt. 393, b. Cowper v. Andrews, Hob. 40. Mary Portington's case, 10 Rep. 38, a.

(*f*) Thel. Dig. l. 11, c. 38, s. 9, 10. Com. Dig. Action, (L. 3).

(*g*) Ferrer's case, 6 Rep. 8, a.

(*h*) Litt. s. 492, 493. Com. Dig. Release, (E. 3).

(*i*) Co. Litt. 286, a. Altham's case, 8 Rep. 151, b.

(*k*) *Ibid.*

(*l*) *Ibid.* And see *ante*, p. 8.

(*m*) Co. Litt. 285, b.

is pleaded, the demandant may reply that the tenant had nothing in the freehold at the time of the release made. (*a*) A release by tenant in tail is no bar to his issue. (*b*) Release.

A release of all actions real is a good plea in a writ of error in which land is to be restored, and if the tenant in a real action release to the demandant, after recovery, his *right in the land*, he cannot have a writ of error, for he cannot be restored to the land. (*c*)

In personal actions in which the cause of action is forfeited by the outlawry, as in detinue, &c.; the outlawry may be pleaded in bar, but in real actions it can only be pleaded in disability of the person. (*d*) Outlawry.

In a writ of right, the general issue or mise is that the tenant has more right to hold the tenements to him and his heirs, than the demandant, as he demands the same, and it is said that every thing but collateral warranty may be given in evidence under this plea. (*e*) In writs of right.

If collateral warranty, or any other matter, is pleaded, the issue is not tried by the grand assise, but by a jury. (*f*) The reason why collateral warranty must be pleaded, is that such warranty does not transfer any right, but only estops the person bound by it, from taking advantage of his right. (*g*) Then as the mise is joined on the mere right, and the grand assise is to inquire in whom the mere right resides, they must on that issue find for the demandant, in whom it does actually reside, though he is barred from taking advantage of it by the collateral warranty. (*h*)

This reasoning has also been applied to the case of a fine levied with proclamations, so as to create a bar by non claim, which it has been thought may be held to leave the right in the

(*a*) Altham's case, 8 Rep. 151, b.
(*b*) Co. Litt. 20, a.
(*c*) Co. Litt. 288, b. 289, a. Darcy v. Jackson, Palm. 247.
(*d*) Co. Litt. 128, b.
(*e*) Br. Ab. Droit, 48. Tyssen v. Clarke, 3 Wils. 420. 2 Saund. 45, m. (note.) Booth 112. As to tenant for life joining the mise, see *ante*, p. 23.
(*f*) Br. Ab. Droit, 42. Booth, 113.
(*g*) Co. Litt. 372, a. 283, a.
(*h*) Fitz. Ab. Droit, 29. Booth, 114. Co. Litt. 283, a. Smith v. Tyndal, 2 Salk. 685.

In writs of right.

real owner, though it bars him of his remedy, and accordingly in some late cases, we find that where the tenant relied upon fines levied with proclamations, they were pleaded in bar. (*a*) It may however be doubted whether this is necessary, and whether the statute, 4 Hen. 7, has not in fact the effect of vesting the right in the party, after the five years passed, and no claim made. The words of the statute are "and the said proclamations so had and made, the said fine to be a final end, and conclude as well privies as strangers to the same." The bar created in this case appears to *imply a right* in the party who is entitled to take advantage of it, according to the distinction taken in Greneley's Case (*b*), between a discontinuance, which implies a wrong, and a lawful bar, which *implies a right*. In that case, the wife, tenant in special tail, with her husband, after a fine levied by him, and five years non-claim, was said to be barred, and to have no *right*, title, or interest.

The rule laid down by Shard, in 34 Ed. 3, is, that when the plea of the tenant proves that he has the right, he shall then say, "*and so he has the greater right*;" but when it appears that he has not the right, but his plea is a bar by reason of a covenant, as a collateral warranty, then he must not conclude to the right. (*c*)

If a writ of right is brought by the donor of an estate tail, against the donee, or by a lessor against a lessee, the donee or lessee may disclose his estate, and plead it in bar against the demandant, concluding *si actio, &c.*, without joining the mise on the mere right. (*d*)

It is said by Booth, that the tenant may plead that the ancestor of the demandant never was seised, but that he cannot traverse the seisin in such a king's reign, but must tender a demi-mark to have it inquired of by the grand assise. (*e*) The effect of the tender of the demi-mark, appears to be to put the demandant, in the first instance, upon the proof of the seisin, as stated in his count; that is, to prove that the seisin was in the king's reign there stated. If the demandant proves the seisin as stated,

(*a*) Tyssen v. Clarke, 3 Wils. 420. Hardman v. Clegg, 1 Holt, N. P. C. 657.

(*b*) 8 Rep. 72, a, and see also Doctor Leyfield's case, 10 Rep. 90, a.

(*c*) Fitz. Ab. Droit, 29. And see Br. Ab. *Juris utrum*, 1.

(*d*) Fitz. Ab. Droit, 41. Booth, 113.

(*e*) Booth, 113, and see as to the plea of darrein seisin, *ante*, p. 206.

In writs of right.

then the cause goes on as if the demi-mark had never been tendered, and the grand assise proceed to inquire of the mere right (*a*); in which inquiry it seems that the tenant is to maintain his title in the first instance. If the demandant cannot prove the seisin as stated, then no inquiry is made into the mere right, and the grand assise must find for the tenant. (*b*) It has been doubted whether final judgment should be given in this case, for it is said that there shall never be final judgment, unless the verdict passes upon the mere right. (*c*) It seems, however, that it is final. (*d*)

The tenant may also, as it seems, traverse the seisin since the stat. 32 Hen. 8, c. 2. (*e*)

It is not very clear at what time the demi-mark should be tendered, whether at the joining of the mise or at the time of swearing the jury. From the case in Littleton (*f*) it appears that it ought to be tendered upon the joining of the mise; but in another case, it is said that although it ought to be tendered at the joining of the mise, yet the judges will take it at the swearing of the jury. (*g*) When the demi-mark is tendered at the joining of the mise, there may be added at the end of the tenant's plea an averment of such tender having been made, "and he tenders here in court 6*s*. 8*d*. to the use of our lord the now king, &c. for that to wit, that it may be inquired of the time, &c.; and he therefore prays that it may be inquired by the assise, whether the said (ancestor) was seised of the tenements aforesaid, with the appurtenances in his demesne as of fee, in the time of the said lord the king, George the First, as the said William in his demand before hath alleged (*h*)," and by this means the tender appears upon the record. In the case of Throgmorton v. Broke, (Gloucester Summer Assises, 1800), Mr. Justice Heath is said to have held, that upon the tender of the demi-mark in

(*a*) Litt. sec. 514. Quære whether the demandant must not also prove that his ancestor was seised, i. e. prove his own descent from that ancestor.

(*b*) Litt. s. 514. Fitz. Ab. Droit, 26.

(*c*) Fitz. Ab. Judgment, 256.

(*d*) Co. Litt. 295, b. And see *post*, in title "Judgment."

(*e*) Br. Ab. Droit, 39. Booth, 113. 10 Wentw. 220.

(*f*) Sec. 514, and see Br. Ab. Droit, 37.

(*g*) Andrews v. Lord Cromwell, Moor, 762.

(*h*) Booth, 102. 3 Bl. Com. App. vii. 3 Ch. Pl. 653. This entry of the tender of the demi-mark, does not appear in any of the old books of entries.

In writs of right.

court, at the time of trial, the demandant must begin. (*a*) In the late case of Hardman v. Clegg, the demi-mark was in fact tendered at the joining of the mise (*b*), though no averment to that effect was put upon the record, and it was again tendered at the swearing of the jury, and the demandant was put upon proof of the seisin as stated in his count. In that case, Wood, B. ruled, that the tender of the demi-mark before the swearing of the assise, was sufficient to put the demandant to shew the seisin of his ancestor.

In *cessavit.*

The seisin of the service is not traversable in a *cessavit*, but the tenure itself may be traversed (*c*); and it is a good plea that the tenant did not cease for two years before the writ brought (*d*), so it is a good plea that the tenements were open to the sufficient distress of the plaintiff. (*e*)

In *quo jure.*

The form of pleading in a *quo jure* (*f*) is very similar to that in a *ne injuste vexes.* The defendant defends the force and injury, and states that he was seised of a common (setting out his title) as of fee and right, by taking the esplees, &c.; and that such is his right he offers, &c. Upon this the plaintiff defends the right of the defendant and his seisin, &c. (as in a *ne injuste vexes*) and puts himself upon the grand assise, and prays a recognition, whether he has not a greater right to hold the lands in severalty, than subject to the right of common, and a traverse is added of the right of common. (*g*)

In *ne injuste vexes.*

In a *ne injuste vexes*, as it has already been shewn (*h*) the de-

(*a*) 2 Saund. 45, m, (note). Booth, (last edit.) 98, note (u), but in Lee's Pr. Dict. 1056, it is said to have been ruled in this case, that the demi-mark ought to be tendered at the joining of the mise, though the judges now take it at the appearance of the jury.

(*b*) This was the case, though it does not appear in the report of the trial, Holt, N. P. C. 657.

(*c*) F.N.B. 209 E. 2 Inst. 296. Rast. Ent. 110, b.

(*d*) F.N.B. 209 H. Rast. Ent. 110, b.

(*e*) Rast. Ent. 110, b.

(*f*) See *ante*, p. 36.

(*g*) Rast. Ent. 539, b.

(*h*) See *ante*, p. 37.

fendant makes defence and pleads in the nature of a count, "And the said C. D. in his proper person comes and defends the force and injury when, &c., and says that he did not unjustly encroach the said rent of 9*s.* besides the aforesaid other services; because he says that the said A. B. holds the said thirty acres of land with the appurtenances as tenant thereof, to him the said C. D. and that he, the said C. D., was seised as well of the said rent of 9*s.* as of the said other services, by the hands of the said A. B. as by the hands of his very tenant of the said thirty acres of land, with the appurtenances, as of fee and right, in the time of peace, in the time of our lord the now king, by taking the esplees thereof to the value, &c. and that such is his right he offers, &c." To this plea the plaintiff replies, "and the said A. B. defends the right of the said C. D. and his seisin, &c., and the whole, &c., as of fee and right, and chiefly of the aforesaid rent of 9*s.* with the appurtenances, and puts himself on the grand assise of our lord the king, &c.; and prays a recognition to be made, whether he has a greater right to hold the said thirty acres of land, with the appurtenances of the said C. D. by the said services of homage and fealty, and by the service of one twentieth part of a knight's fee, as also by the service of rendering annually to the said C. D. one pound of pepper for all services as he holds them, or by the said services, and moreover by the rent of 9*s.* per annum, as the said C. D., says, &c.(*a*)

In *ne injuste vexes.*

The general issue in dower *unde nihil habet* is *ne unques seisie que dower*, upon which plea the jury are only to inquire whether the husband was ever seised of a dowable estate, and if they find the affirmative, judgment must be for the demandant, although the estate has been defeated by title paramount.(*b*) The tenant may plead *ne unques seisie*, as to part, with another bar as to the residue.(*c*)

In dower *unde nihil habet.*

General Issue.

In all cases therefore, where the seisin of the husband, and

Remitter, &c.

(*a*) Rast. Ent. 437, b.

(*b*) Rast. Ent. 230, a, Co. Ent. 176, a. Co. Litt. 31, b. Dyer, 41, a. 1 Leon. 66, but see Countess of Berkshire v. Vanlore, Winch, 77.

(*c*) Clift's Ent. 303. Com. Dig. Pleader, (2 Y. 7). but the court will not grant leave to plead *ne unques seisie* and *ne unques accouple* to the same part, without special cause, Anderson v. Anderson, 2 Black. 1157. Hillier v. Fletcher, *Ib.* 1207.

In dower *Unde nihil habet.*

consequently the dower of the wife, is defeated by title paramount, as by remitter, it is necessary to plead the special matter, as where a man, seised in tail general, discontinues in fee, and takes back an estate in fee simple, and afterwards takes wife, has issue, and dies; in this case the title of dower, which attached upon the seisin in fee, is defeated by the remitter of the issue to the estate tail(*a*); so also in case of an exchange, made before title of dower accrued, where one of the parties recovers against the other on the implied warranty, whereby the wife of the recoveree is barred of her dower in the land recovered(*b*); and the same law in case of partition between coparceners in gavelkind(*c*); and so also where the estate of the husband is defeated by condition(*d*); in these and all other cases where the dower is defeated by title paramount, the matter should be specially pleaded. Jointenancy of the husband with the tenant is a good plea in bar, and does not amount to the general issue, by reason of the fee simple confessed in the baron(*e*); but it should seem that this may be given in evidence, under the plea of *ne unques seisie que dower*, for dower does not attach upon an estate in jointenancy.(*f*)

Ne unques accouple.

If the tenant controverts the validity of the demandant's marriage with the person, out of whose lands she claims dower, he may plead *ne unques accouple en loyal matrimonie.*(*g*) To which plea the demandant must reply that she was accoupled in lawful matrimony at B., in such a diocese, upon which a writ issues to the bishop of that diocese, requiring him to certify the fact to the court. (*h*) The demandant cannot reply a sentence in the ecclesiastical court, declaring the marriage valid, for that is only matter of evidence of which the bishop is the proper judge; but if the bishop has already certified the matter to the court, that certificate may be replied, and shall be a good estoppel against all the world.(*i*) As the bishop is the proper judge of marriage or no marriage, bigamy cannot be specially

(*a*) F.N.B. 149 F. Co. Litt. 31, b.
(*b*) Perk. sec. 309.
(*c*) Perk. sec. 310.
(*d*) 1 Rol. Ab. 478, l. 5. Perk. sec. 311, 318, 317. Osmond & Ux. Noy, 66.
(*e*) Br. Ab. Dower, 84.
(*f*) See Park on Dower, 39.
(*g*) Co. Ent. 180, a. Com. Dig. Pleader, (2 Y. 10).
(*h*) Co. Ent. 180, a. East. Ent. 228, b. Dyer, 313, a. 368, b. Ilderton v. Ilderton, 2 H. Bl. 145.
(*i*) Robins v. Crutchley, 2 Wils. 132, 127. Br. Ab. Estop. 78, as to bastardy.

pleaded, but the tenant must plead *ne unques accouple*, &c. and contest the marriage in the bishop's court. (*a*) In dower *Unde nihil habet.*

If the court in which the dower is demanded be an inferior jurisdiction which cannot write to the bishop, the record may be removed by *mittimus* into the Common Pleas, and when the certificate is returned into that court, the record may be remanded, as in case of foreign voucher, to the court below. None but the king's courts of record, as the King's Bench, Common Pleas, justices of gaol delivery, and the like, can write to the bishop. (*b*)

If the marriage was celebrated in Scotland, where there is no episcopal establishment, the fact must of necessity be tried by a jury, and, therefore, the replication should conclude to the country, and the issue will be tried in the county where the venue is laid (*c*); but unless the marriage be in Scotland, or some foreign country, if the replication to the plea of *ne unques accouple*, &c., conclude to the country, it will be bad. (*d*)

The bishop must return to the certificate the fact of marriage or not, and not the special matter or evidence. (*e*) If the certificate be insufficient, a new writ goes to the bishop. (*f*) If the plaintiff will not sue out this writ, the defendant may do so, upon notice to the plaintiff, or motion. (*g*)

The tenant may also plead that the demandant eloped from her husband, and lived with another person in adultery during the coverture (*h*); to which the demandant may reply, that she did not elope (*i*); or that she was afterwards, without ecclesiastical coercion, reconciled to her husband. (*k*) Elopement.

A divorce *à vinculo matrimonii*, is a good plea. (*l*) Divorce.

So a jointure made by demandant's husband on her before marriage (*m*); or a jointure after marriage, and agreement to it by the wife after the husband's death (*n*); to which the demand- Jointure.

(*a*) Br. Ab. Dower, 54.

(*b*) Co. Litt. 134, a. Co. Ent. 180, b. Com. Dig. Pleader, (2 Y. 10). Beeth, 167.

(*c*) Ilderton v. Ilderton, 2 H. Bl. 145.

(*d*) Robins v. Crutchley, 2 Wils. 128.

(*e*) Dyer, 305, b. 313, b. Easterby v. Easterby, Barnes, 1. 2 Rol. Ab. 391. As to the mode of proceeding in the bishop's court, see Park on Dower, 220.

(*f*) 2nd Towns. Judgm. 95, 96.

(*g*) Smith v. Smith, T. Jones, 38.

(*h*) Co. Litt. 32, b. Haworth v. Herbert, Dyer, 107, a. 1 Bro. Ent. 904. Rast. Ent. 230, a. Park on Dower, 223.

(*i*) 2 Bro. Ent. 109. Rast. Ent. 230, a.

(*k*) Dyer, 107, a. Co. Litt. 32, b. 1 Bro. Ent. 904.

(*l*) Co. Litt. 32, a. and note (9).

(*m*) Co. Ent. 172, a, b. Co. Litt. 36, b.

(*n*) Co. Ent. 171, b. Hob. 104, and see *post*, plea of assignment of dower.

In dower *Unde nihil habet.*

ant may reply, that the estate was not made to such uses, or that it was not made for a jointure. (*a*)

Fine and recovery.

A fine with proclamations levied by the husband, and five years non claim, may be pleaded in bar (*b*), to which the wife may reply, that she brought her writ of dower within five years after her husband's death. (*c*) So it is a good plea that the demandant and her husband levied a fine, or suffered a common recovery of the lands. (*d*) But a fine by husband and wife, of lands limited for a jointure, *after* marriage, does not bar the wife of her dower. (*e*)

Attainder.

Attainder of treason, of the husband, is also a good plea in dower. (*f*)

Husband alive.

That the demandant's husband is alive, may be pleaded in bar; to which plea the demandant may reply, that her husband is dead, and a day is thereupon given her to prove his death, which must be done in court, by two witnesses at least; and at the same day, the tenant may examine his witnesses, to prove that the husband is alive. If it appear to the court, by witnesses, that the husband is dead, the demandant shall have judgment immediately; and so if the proof of his death is not direct, provided there be no proof of his being alive. (*g*)

Assignment of dower.

An assignment of dower is a good plea in bar, as in dower against the feoffee of the husband, that lands have been assigned for dower to the demandant by the heir (*h*), or by the tenant himself being assignee of the husband (*i*); but if lands have been assigned for dower, by one alienee of the husband, it seems that another alienee in dower brought against him, cannot avail himself of such assignment (*k*); and an assignment by the husband's executor is no plea. (*l*) The tenant may plead that he assigned a rent of so much per annum, in recompense of her dower, which she accepted; but he must shew that he had a sufficient

(*a*) Co. Ent. 172, a, b.

(*b*) The wife cannot enter, and suing her writ of dower is therefore the only mode of avoiding the fine. 3 Leon. 50. But the mere delivery of the writ to the sheriff, without procuring it to be returned, is not a sufficient claim to avoid the fine. Fitzhugh's case, 3 Leon. 221.

(*c*) Co. Ent. 171, a, b. Clift Ent. 305. 3 Leon. 50, 221.

(*d*) Com. Dig. Pleader, (2 Y. 14).

(*e*) 1 Leon. 285. Co. Litt. 36, b.

(*f*) Hawk. P. C. c. 49.

(*g*) Bro. Ent. 205. Bend. pl. 131. Thorne v. Rolfe, Dyer, 185, a. 1 And. 20. Moor, 14, S. C.

(*h*) Moor, 25, but *quære*, whether the tenant ought not to vouch the heir, and not to plead, Co. Litt. 35, a.

(*i*) Com. Dig. Pleader, (2 Y. 15).

(*k*) Co. Litt. 35, a. but see Perk. s. 402.

(*l*) Moor, 26.

estate in the land out of which the rent might be granted (*a*); and the assignment must be absolute, and not upon condition. (*b*)

In dower *unde nihil habet.*

So a release of all actions for dower to the tenant of the freehold may be pleaded (*c*); or a release of all demands to the reversioner. (*d*)

Release.

The tenant cannot plead a prior term of years *in bar* to the action, for it is no bar to dower, but he may plead it in delay of execution, and to save himself from damages. (*e*) If there be any rent reserved upon the term, the tenant should pray, that the demandant may be endowed of the reversion and the rent. (*f*) But if the tenant does not plead such term, he cannot set it up afterwards, as a prior title, in an ejectment brought by the tenant in dower, after her recovery, to obtain possession. (*g*)

Prior term of years.

There are also certain pleas, which admitting the title of dower, allege some excuse or reason for not having made an assignment; such are the pleas of *detinue of charters* and *tout temps prist.*

In the plea of detinue of charters, the tenant alleges, that the demandant detains the deeds and evidences belonging to the estate, and that the tenant was always ready to assign her dower, if she would deliver them; this plea, therefore, cannot be pleaded after an imparlance. (*h*)

Detinue of Charters.

This plea lies in privity, and therefore no one but the heir can plead it, and he must shew the certainty of the charters, so that a certain issue may be joined; or that they are in a chest or box locked or sealed (*i*); but if the heir has himself delivered the

(*a*) Beaumont v. Dean, 2 Leon. 10. Moor, 59.

(*b*) Wentworth v. Wentworth, Cro. Eliz. 451.

(*c*) Anon. Cro. Jac. 151.

(*d*) Ed. Altham's case, 8 Rep. 150, b. 154, a. Albany's case, 1 Rep. 112, b.

(*e*) "But though this is a good plea in law, the demandant may have relief in equity against the heir or devisee of the husband, or his assignee if he have become bankrupt, 1 P. Wms. 137, Wray v. Williams, Prec. in Ch. 151 S. C. Prec. in Ch. 244, Lord Dudley v. Dudley, 9 Vin. Ab. 227. Squire v. Compton. But not against a purchaser for a valuable consideration, even with notice, if he have taken an assignment of the term to a trustee for himself. Show. Ca. in Par. 69. Lady Radnor v. Vandebendy, Prec. in Ch. 65, S. C. Amb. 6, Swannock v. Lifford, Butl. notes to Co. Litt. 208, a. n. 105. 7 Ves. jun. 567, Maundrell v. Maundrell, 10 Ves. jun. 246, S. C." 2 Saund. 44, c. *new notes.*

(*f*) Booth v. Lindsey, 2 L. Ray. 1294. Anon. 2 Mod. 18. Rob. Ent. 237, and see *post*, in "Judgment."

(g) Lindsey v. Lindsey, 1 Salk. 291. 2 L. Ray. 1294.

(*h*) Rast. Ent. 229, b. Br. Ab. Dower, 53. Bedingfield's case, 9 Rep. 18. Burdon v. Burdon, 1 Salk. 252. Com. Dig. Pleader, (2 Y. 6).

(*i*) 9 Rep. 18, a. Dyer, 230, a.

In dower *Unde nihil habet.*

charters to the widow, he cannot plead detinue, for she then has them by his own act. (*a*)

As privity is the foundation of this plea, it cannot be pleaded, even by the heir, in the four following cases. (*b*) 1. If he has the lands by purchase, and not as heir. 2. If he is not immediately vouched, but is only vouched by the first vouchee. 3. If he comes in as vouchee, having no lands in the county where the dower is demanded. 4. If he comes in as tenant by receit. In two of these cases the plea would be obviously incongruous, for it affirms, that the party has been always ready, and yet is to render dower, whereas a second vouchee or tenant by receit, cannot render dower; nor can it be recovered immediately against them, the judgment being against the original tenant in both cases. (*c*)

It is said, that if the wife be with child, the heir presumptive cannot plead detinue of charters, for the wife may keep them for the infant (*d*); and it should be observed, that this plea is not a bar for more lands than the charters concern. (*e*)

To the plea of detinue of charters, the wife may reply *non detinet* (*f*) but if this issue is found against her, she is barred of her dower. (*g*) If the demandant replies, that she is ready to deliver them to the tenant, and brings them into court, she may pray judgment upon his confession immediately. (*h*)

Touts temps prist.

Another plea in excuse, is the plea of *touts temps prist*, that the tenant has always been, and still is, ready to render dower. (*i*) And if this plea is pleaded the first day of the return of the summons, the tenant is excused from damages. (*k*) The tenant may likewise plead, that the demandant abated, and was in by abatement until such a day, and afterwards, *touts temps prist.* (*l*) Upon the plea of *touts temps prist*, the demandant may have judgment immediately, but shall lose her damages and mesne profits (*m*); but if she demanded her dower, though it was only by request *in pais*, she may reply this demand, upon which issue

(*a*) 9 Rep. 18, a.
(*b*) 9 Rep. 18, a.
(*c*) 9 Rep. 18, a. Park on Dower, 295.
(*d*) Br. Ab. Dower, 8. Park. s. 360.
(*e*) Dyer, 230, a.
(*f*) Rast. Ent. 229, b.
(*g*) Hob. 199.
(*h*) Rast. Ent. 229, b. Hob. 199. 9 Rep. 18, a.
(*i*) Rast. Ent. 236, b. 1 Brown's Ent. 205.
(*k*) Co. Litt. 32, b. and see *post*, in "Damages."
(*l*) 1 Lutw. 715.
(*m*) Co. Litt. 32, b. 1 Brown's Ent. 206.

may be taken, and the damages will await the event of that issue. (*a*)

In dower *unde nihil habet.*

The general issue in *formedon* is *non dedit*, which puts in issue the making of the entail—"that the said A. did not give the tenements aforesaid, with the appurtenances to the said B., and the heirs of his body issuing, as the demandant has supposed." This plea is a bar in all *formedons*, and may be pleaded by a vouchee. (*b*)

In *formedon.*

The tenant may plead a paramount title in bar, as in *formedon* in the descender, that before the gift alleged by the demandant, the tenant's ancestor was seised in tail and died, that the demandant's donor abated, and that the tenant was afterwards remitted to his original estate tail. (*c*) So it is a good plea, that the person under whom the tenant claims, being seised in fee, before the gift alleged by the demandant, and being under age, made a feoffment in fee to the demandant's donor, who gave back the land to him in tail while under age, whereby he was remitted (*d*) to his estate in fee: and so that the gift was after a disseisin, and that the disseisee recovered subsequently to the gift. (*e*) Where the tenant pleads a title paramount to the estate tail alleged by the demandant, the latter may maintain his count and traverse such title, upon which issue may be joined. (*f*)

An exchange between the ancestor of the demandant and the tenant, or him under whom the tenant claims, may be pleaded in bar in *formedon*, and the tenant should aver, that the demandant has entered into the lands given in exchange, and taken the profits, and an alienee may plead this plea, being privy in estate. (*g*)

Where a reversioner, remainderman, or tenant or issue in tail is barred by a common recovery, and a *formedon* is brought by any of them, such recovery may be pleaded in bar (*h*), and a fine, with proclamations, levied by tenant in tail, may be pleaded

(*a*) Co. Litt. 32, b. Lutw. 717. Hale's note, Co. Litt. 33, a. (1). and see *post*, in "Damages."

(*b*) Booth, 163. Herne's Pleader, 508, b. Co. Ent. 322, b. and see Dowland v. Slade, 5 East, 289.

(*c*) Coke's Ent. 325, b.

(*d*) Fitz. Ab. *Formedon*, 2. Br. Ab. *Formedon*, 24.

(*e*) Com. Dig. Plead. (3 E. 4). Br. Ab. *Formedon*, 3.

(*f*) Co. Ent. 336, b. Booth, 164.

(*g*) Fitz. Ab. *Formedon*, 44. Co. Litt. 384, b. Booth, 165.

(*h*) Thompson v. Warner, Noy, 1. Booth, 164. Com. Dig. Plead (3 E. 4).

In *formedon.*

in bar in a *formedon* in the descender, and a fine, with proclamations, and five years non claim, in a *formedon* in the reverter or remainder. (*a*)

But if a recovery, (not a common recovery,) is had against tenant in tail by default, as if A. recovers against tenant in tail, in a writ of entry, upon a disseisin alleged by him of the grandfather of A., and after default execution is sued, the issue in tail may bring a *formedon*, and if the recovery is pleaded, may say, that the tenant in tail did not disseise the grandfather of A. (*b*) So if the recovery is against tenant in tail by *nil dicit*, confession, or demurrer (*c*); and if a recovery is against tenant in tail by verdict, though the issue in tail cannot falsify it in the point tried, he may falsify it by collateral matter, as by a warranty, or release not pleaded by tenant in tail; or he may falsify the recovery by confession and avoidance of the point tried. (*d*)

Lineal warranty, with assets, may be pleaded in bar, in a *formedon*, brought by the issue in tail. (*e*) So collateral warranty without assets, was a good plea before the statute 4 and 5 Anne, c. 16, and in a *formedon* in the remainder, a collateral warranty without assets, made by tenant in tail in possession, descending upon him in remainder, may still be pleaded in bar. (*f*) A stranger may take advantage of a warranty by way of rebutter. (*g*)

In writ of entry *sur disseisin.*

The general issue in a writ of entry *sur disseisin* is, that the tenant did not disseise the demandant in manner and form, as he has in his writ and declaration above supposed. (*h*) In entry *sur disseisin*, of a rent, the tenant may plead, that the tenements out of which the rent is supposed to issue are so many acres called A. in B., of which he is tenant of the freehold, and that those tenements are out of the fee and lordship of the demandant, and he may pray judgment whether, without shewing to the court a special title to the rent, the demandant shall maintain his

(*a*) Co. Litt. 372, a, b. Com. Dig. Pleader, (3 E. 4). Co. Ent. 317, a.

(*b*) Litt. s. 688. Com. Dig. Recovery, (B. 6).

(*c*) Co. Litt. 361, a.

(*d*) *Ibid.*

(*e*) Co. Litt. 374, b. Rast. Ent. 61, a.

(*f*) Co. Litt. 374, b. Mr. Butler's note, 373, b. (328). Bole v. Horton, Vaugh. 360. Br. Ab. *Formedon*, 73. Shep. Touch. 194. The court was equally divided in Bole v. Horton on the question of a collateral warranty barring him in reversion.

(*g*) Br. Ab. *Formedon*, 10.

(*h*) Rast. Ent. 272, b, 283, a, b. Booth, 179.

action against him. (*a*) The tenant may plead a recovery against a stranger in a writ of entry in the *post*, by A. B., whose estate the tenant has, and the title of the demandant mesne between the disseisin and the recovery. (*b*) So the tenant may plead any other plea shewing title in bar, and giving colour where it is necessary. Thus he may plead a descent to himself in fee, giving colour (*c*), or that he entered as lord by escheat, giving colour (*d*); so that A. being seised in fee, enfeoffed the tenant in fee. (*e*) That tenant for life aliened by fine in tail, and committed a forfeiture, wherefore the tenant entered as reversioner, is a good plea. (*f*) In a writ of entry brought by the heir on a disseisin done to his ancestor, the tenant may plead in bar, that the demandant is a bastard. (*g*)

In writ of entry *sur disseisin.*

The general issue in a writ of entry *sur intrusion* is, that the tenant did not intrude in manner and form, &c.; or the tenant may plead specially; as in a writ of intrusion, brought by the heir after the death of a tenant for life, upon a lease made by his ancestor, that the ancestor never had any thing in the land; to which the demandant ought to reply, that the ancestor was seised and demised, and issue must be taken on the seisin. (*h*) So in intrusion upon the death of tenant for life, upon a lease made by the demandant, the tenant may plead, that he who is named tenant for life, was tenant in tail of the gift of the tenant, and that he died without issue, wherefore the tenant entered as in his reversion, traversing, that he who is named tenant for life, had any thing at the time of his death, of the lease of the demandant. (*i*) It has been doubted, whether, in intrusion, after the death of tenant for life, the tenant can plead, that he who is named tenant for life, was seised in fee. (*k*)

In writ of entry *sur intrusion.*

(*a*) Rast. Ent. 272, b.

(*b*) Rast. Ent. 274, a.

(*c*) *Ibid.* 273, a. and see the Replication of recovery in writ of right against prior tenant for life; rejoinder falsifying the recovery, by pleading that nothing passed to the tenant for life. *Ib.*

(*d*) Rast. Ent. 273, b. Replication, that the tenant had issue; rejoinder, that the issue was bastard, *Ib.*

(*e*) Rast. Ent. 275, a.

(*f*) Rast. Ent. 280, b.

(*g*) Rast. Ent. 279, b.

(*h*) Br. Ab. Intrusion, 3. Booth, 184.

(*i*) Br. Ab. Intrusion, 11.

(*k*) Br. Ab. Intrusion, 2. Booth, 184.

In other writs of entry.

The tenant in a *cui in vitâ* may plead such pleas as go to destroy the wife's title to the land, or to shew that she is estopped from claiming it. Thus he may plead in bar that the wife has accepted rent after the death of her husband, in case the lease was made by the baron and feme.(*a*) So if after the husband's death the alienee assigns a third part of the land aliened to his widow in dower, by deed, this shall bind her.(*b*)

In a *cui ante divortium*, the tenant may plead the divorce repealed.(*c*)

In a *dum fuit non compos mentis*, the general issue is *fuit compos mentis tempore feoffamenti*, &c.(*d*)

In a *dum fuit infra ætatem*, the general issue is that the party was of full age at the time of the demise, &c.(*e*)

In an *ad terminum qui præteriit*, the tenant may deny the demise, upon which the demandant counts.(*f*)

In assise of *novel disseisin*.

Plea by Tenant.

The general issue in assise is *nul tort, nul disseisin;* upon which plea the points of the assise, viz. the seisin and disseisin are to be inquired into. Whenever the tenant pleads a special plea in assise, or a *flat bar*, as it is called, the assise is said to be taken out of the point of assise.(*g*)

The tenant may plead specially in bar, as a former recovery in assise(*h*); that the plaintiff ousted him, and he presently reentered(*i*); entry for breach of condition(*k*); or a title paramount, as in an assise of a rent charge against a feme and others, the feme may plead that she was endowed before the charge commenced(*l*); so the tenant may plead that the plaintiff was not seised within thirty years, and so also a descent cast and non claim.(*m*)

A feoffment by the plaintiff to the defendant is no plea in assise, because it merely amounts to the general issue of a *nul tort, nul disseisin,* but if a feoffment with warranty is pleaded, and

(*a*) Br. Ab. *cui in vitâ*, 1. Booth, 188.
(*b*) Br. Ab. *cui in vitâ*, 25.
(*c*) Rast. Ent. 138, b.
(*d*) Rast. Ent. 249, a. Booth, 189.
(*e*) Rast. Ent. 248, b. Booth, 194.
(*f*) Rast. Ent. 25, b. Booth, 196.
(*g*) Dyer, 311, a. Gilb. Hist. C. P. 59. And see *post*, as to the mode of taking an assise.
(*h*) Booth, 274. Com. Dig. Ass. (B. 13).
(*i*) Br. Ab. Ass. 30. Booth, 274.
(*k*) Br. Ab. Ass. 153.
(*l*) Br. Ab. Ass. 184.
(*m*) Com. Dig. Assise, (B. 13). See further as to pleas by tenant, Booth, 274.

the defendant relies upon the warranty, this is good.(*a*) So the plea of a lease for life by the plaintiff to the defendant is not of itself good, but the plea of a lease for life with rent reserved, the reversion to the plaintiff, upon which the defendant relies as a warranty, is good (*b*), and a lease for years, the reversion to the plaintiff, is a good bar, but in this case the lessee shall not say *assisa non, &c.* which is the form of pleading of the tenant of the freehold, but he must justify by force of the lease, and conclude et *issint sans tort*, and so tenant by elegit, statute staple, &c.(*c*) In assise of *novel disseisin.*

If the tenant pleads specially, he may afterwards waive his special plea and plead the general issue, *nul tort, &c.* though the plea be entered, or the recognitors ready to take the assise, and so at another day to which the assise is adjourned *pro defectu juratorum.*(*d*)

As a disseisor, not tenant of the land, is only to answer in damages, he can only plead such pleas in assise as go in excuse of damages, and not to the right of the land. Thus he may plead the general issue, *nul tort, nul disseisin*, or a release of actions personal, but not a release of actions real (*e*); though if the same person be both disseisor and tenant, he may plead a release of actions real.(*f*) A disseisor in assise cannot appear by attorney.(*g*) By disseisor.

The writ of assise directs the sheriff to attach the disseisor, or if he be not found, his bailiff, and the bailiff may therefore appear and plead certain pleas in his own name. "C. as bailiff of B.;" and not "B. by C. his bailiff."(*h*) The bailiff may plead in bar every plea that may be tried by the recognitors of assise, upon which he can conclude *et si trouve ne soit, nul tort, &c.* and which is not out of the point of assise, but he cannot plead any matter of record, and if he should do so the justices may proceed. After plea to the assise, pleaded by the bailiff, the tenant may come before the assise taken and plead a record, deed, release, &c. (*i*) By Bailiff.

(*a*) Br. Ab. Ass. 391. Co. Litt. 228, b. Jenk. Cent. 142, 224.

(*b*) Br. Ab. Ass. 352, 380. Co. Litt. 228, b. Jenk. Cent. 224.

(*c*) Br. Ab. Assise, 391. Co. Litt. 229, a. Jenk. Cent. 142.

(*d*) Com. Dig. Assise, (B. 13). Booth, 275.

(*e*) Litt. s. 494. Co. Litt. 268, a. Br. Ab. Assise, 14. Com. Dig. Assise, (B. 14). 2 Inst. 414. Booth, 271.

(*f*) Colt v. Bp. of Cov. Hob. 163. Lord Nott. MSS. in Co. Litt. 285, b. note 1.

(*g*) Com. Dig. Attorney, (B. 6).

(*h*) *Ibid.* Ass. (B. 15.) 2 Inst. 415.

(*i*) Com. Dig. Assise, (B. 15) 2 Inst. 414, 415. And see Vin. Ab. Assise, (Q. a). Booth, 272.

In assise of *novel disseisin.* Replication.

If the defendant pleads in bar a matter of record, as a recovery, fine, &c. the plaintiff must answer to the bar; and so if by his bar he gives a title to the plaintiff and avoids it, as by a feoffment to the plaintiff, upon condition, and an entry for the condition broken. If the defendant gives possession to the plaintiff, and no colour, the latter must traverse the matter of the bar without making a title to himself at large; so, if the defendant pleads matter in another county. (*a*) But in general where the defendant makes a special bar, the plaintiff need not answer to the bar, but may make a title to himself at large, as in all cases where the defendant gives colour. (*b*) And where the plaintiff thus makes a title at large, the defendant in his rejoinder may say *ven' assisa super titulum*, and is not forced to maintain his bar. (*c*)

In redisseisin.

In a writ of redisseisin, although the sheriff (who is judge) is only directed by the statute to make an inquisition (*d*); yet the defendant may plead in abatement or in bar, as a release, &c. (*e*)

In *juris utrum*.

The general issue in *juris utrum* is said to be, that the land is the tenant's lay-fee, and not the alms of the church (*f*), or the tennant may plead specially, as a recovery in a real action against the predecessor of the demandant, and so the tenant's lay fee, and this plea in analogy to a similar plea to a writ of right, has been held not to be double. (*g*)

In assise of *mortd'ancestor*.

The general bar in *mortd'ancestor*, is that the ancestor was not seised on the day of his death, and upon this plea the points of the writ, viz. whether the ancestor died seised, within the time of limitation, and whether the demandant is his next heir, shall be inquired into. (*h*) The tenant may plead specially a feoffment

(*a*) Com. Dig. Assise, (B. 16). Booth, 278.

(*b*) Com. Dig. Assise, (B. 17). Booth, 278. Gilb. Hist. C. P. 59.

(*c*) Booth, 214.

(*d*) *Ante*, p. 70.

(*e*) 2 Inst. 83. Keilw. 125, b. Booth, 260.

(*f*) Booth, 222. Coke's Ent. 400, b. And see Dowland v. Slade, 5 East, 289.

(*g*) Br. Ab. *juris utrum*, 1. Booth, 222.

(*h*) Com Dig. Assise, (C. 4, 5). Br. Ab. Mortd. 21, Cos. 10. Booth, 207, 9. *Ante*, p. 76.

made by the ancestor, but in that case he must also traverse the dying seised (*a*), or a fine or recovery of the ancestor, without such traverse. (*b*) So the tenant may plead a lease for years or for life granted by the ancestor (*c*), and bastardy may be pleaded in bar. (*d*) According to the nature of the plea, the assise of *mortd'ancestor* is taken in the point of assise, out of the point of assise, or for damages only. (*e*)

In assise of *mortd'ancestor.*

In aiel, besaiel, and cosinage, which are actions ancestral possessory, the tenant may plead that the ancestor, from whom the demandant claims, was not seised on the day of his death. (*f*) So the tenant may plead that he, or a stranger is heir to the ancestor. (*g*) Before the statute of Westminster 2, c. 20, the tenant was not permitted to plead that the demandant was not next heir to the ancestor, on whose seisin he counted, without shewing who was the heir, which by that statute he need not do. (*h*) It is also a good plea that the ancestor was not seised within fifty years (*i*), or that the demandant is a bastard (*k*)

In aiel, besaiel, and cosinage.

The defendants in *quare impedit* are entitled to an imparlance, and may afterwards either join or sever in pleading (*l*), according to the nature of their defence, and where they plead several pleas in bar, and the issue on one of them is found for the plaintiff, he cannot have execution until the other issues are determined. (*m*)

In *quare impedit.*

1. *Pleas by the ordinary.* The ordinary, to prevent himself from being considered a disturber, and thus to excuse himself from damages, may if he pleases disclaim all title, except to admit and institute, but this plea cannot be pleaded after he

By the ordinary.

(*a*) Br. Ab. Mortd. 49, 52.
(*b*) Br. Ab. Mortd. 52. Booth, 208.
(*c*) Br. Ab. Mortd. 40, 42.
(*d*) Br. Ab. Mortd. 13. Booth, 208. Com. Dig. Assise, (C. 4).
(*e*) 2 Inst. 399. Dyer, 311, a; and see *post*, in "Jury process and trial."
(*f*) Br. Ab. Cosinage, 10. Rast. Ent. 29, a. Com. Dig. Assise, (D). Booth, 203. *Ante*, p. 127.
(*g*) Br. Ab. Cosinage, 4, 7 9.
(*h*) 2 Inst. 400.
(*i*) Com. Dig. Assise, (D). Herne's Pl. 61.
(*k*) Rast. Ent. 29, b.
(*l*) Com. Dig. Pleader, (3 I. 7).
(*m*) Jenk. Cent. 11. Wats. Clerg. Law, 287. *Post*, in title "Judgment."

In *quare impedit.* has essoigned himself, on account of the delay incurred. (*a*) Upon this plea the plaintiff is entitled to judgment, and a writ to the bishop, with a *cesset executio*, till the other pleas are determined. (*b*) If the *cesset executio* is omitted, it is only matter of form, but if no *cesset executio* is entered, and execution is in fact issued, before the other pleas are determined, it is error. (*c*) The plaintiff upon this plea need not, though he usually does, accept the disclaimer, but may maintain the ordinary a disturber; though if the issue is found against the plaintiff, he is barred and cannot have a writ to the bishop to remove a clerk, collated by the latter *pendente lite*. (*d*)

By the ordinary.

The ordinary may also plead the general issue *ne disturba pas* (*e*); but this is never done, except in cases where there has been actually no refusal to admit and institute the plaintiff's clerk; this plea amounts to a disclaimer, and the plaintiff may either take judgment with a *cesset executio*, or may maintain the disturbance for damages. (*f*)

If an unfit person is presented to the bishop, he may refuse to admit him, and may plead this refusal in a *quare impedit*. Thus he may be unfit as to his person, as that he is a bastard, an outlaw, excommunicate, an alien, or under age, or he may be unfit on account of his faith or morals, as for some particular heresy, or some vice *malum in se*, or he may be unfit for want of learning, or because he is simoniacally presented (*g*); but in general in these cases the bishop must shew the cause of his refusal specially (*h*), and cannot state it generally, as that the clerk is *schismaticus inveteratus*. (*i*) If a special plea of justification is found against the bishop it makes him a disturber. (*k*)

At common law, neither the ordinary nor the incumbent could plead to the right of patronage, for they had neither of them

(*a*) Brickhead v. Abp. of York, Hob. 198, 200. Co. Ent. 498, b. Keilw. 43, a.

(*b*) Brickhead v. Abp. of York, *ubi sup.* Tufton v. Temple, Vaugh. 6.

(*c*) Grange v. Denny, 3 Buls. 177. 1 Rol. Rep. 363. S. C.

(*d*) Brickhead v. Abp. of York, Hob. 198. Elvis v. Abp. of York, Hob. 320.

(*e*) Colt v. Bp. of Cov. Hob. 162.

(*f*) Colt v. Bp. of Cov. *ubi sup.* R. v. Bp. of Worcester, Vaugh. 58. Winch. Ent. 709.

(*g*) 2 Rol. Ab. 355, 6. 2 Inst. 632. 1 Bl. Com. 389. Specot's case, 5 Rep. 58, a.

(*h*) But a general plea of *in literaturâ insufficiens* was held upon error to the House of Lords to be good. Hill v. Bp. of Exeter, 3 Lev. 313. Wats. Cl. Law, 275.

(*i*) Specot's case, 5 Rep. 57, b. 3 Leon. 199. S. C. 2 Inst. 632.

(*k*) Specott v. Bp. of Exeter, Gouldsb. 35.

any thing in the advowson, but by statute 25 Ed. 3, c. 7, passed in order to prevent feint pleading in the patron, the archbishop or bishop, who presents by lapse, may counterplead the title to the patronage in a *quare impedit*, brought by the king, or by a common person, and may shew and defend his right; but an ordinary who has not actually collated by lapse, cannot plead to the title (*a*), for the power of pleading to the title is only given him by the statute, in order to preserve his own right of collation. In *quare impedit.* By the ordinary.

The ordinary is not concluded by the plea of the patron; if the latter pleads the general issue the former may still avail himself of a special justification. (*b*)

If the ordinary disclaims and dies, his death may be suggested on the roll by another defendant, who may pray that the plaintiff reply. (*c*)

2. Pleas by the patron.—The patron may plead the general issue of *ne disturba pas*, if in fact no disturbance took place, and upon this plea, as when it is pleaded by the ordinary, the plaintiff may either pray judgment and a writ to the bishop, or may maintain the disturbance and proceed for his damages. (*d*) By the patron.

At common law before the statute of Westminster 2, c. 5, plenarty at the time of the writ purchased was a good bar in *quare impedit*, when pleaded by the patron, for though the presentation were wrongful, yet it had the effect of giving a tortious fee to the pseudo patron, and of turning the estate of the true patron to a right, which could not be revested by a *quare impedit*, which is merely a possessory remedy. (*e*) This was remedied by the statute of Westminster 2, c. 5, by which it is enacted that in a *quare impedit*, if the defendant allege plenarty of the church of his own presentation, the plea shall not fail by reason of the plenarty, so that the writ be purchased within six months. (*f*)

Since the statute, therefore, the patron, in pleading a plenarty

(*a*) Helwayes v. Abp. of York, W. Jones, 5. Hob. 316, 318, S. C. 7 Rep. 26, a. Before this statute, if on a voidance, a pseudo patron had presented, whose clerk the bishop refused, and the true patron neglected to present, and the bishop collated, in a *quare imp.* brought by the pseudo patron, the clerk of the bishop might have been removed, because the bishop could not deny the pseudo patron's title. Hob. 318.

(*b*) Doct. Pl. 274.

(*c*) Berkeley v. Hansard, 2 Salk. 559.

(*d*) Colt v. Bp. of Cov. Hob. 162. R. v. Bp. of Worc. Vaugh. 58. Winch. Ent. 709.

(*e*) See *ante*, p. 26.

(*f*) These are Calc. months, 2 Inst. 361. Catesby's [illegible], 6 Rep. 62, a.

In *quare impedit.*

By the patron.

by his own presentation must state that the church has been full of such presentation for six months before the purchase of the writ(*a*), and if a second writ has been sued out by journey's accounts, the plenarty must appear to have been six months before the purchase of the first writ. (*b*) When a lay patron pleads plenarty by his own presentation, it is not necessary for him to shew a right of patronage in his plea(*c*), for the presentation, admission, and institution of his clerk, give him a sufficient title in a *quare impedit.*(*d*) In case of an appropriation, it seems that a defendant cannot plead plenarty without shewing in his plea the origin of the appropriation.(*e*) When it is said that plenarty by the presentation of a stranger may be pleaded, it must be understood of such a plea by the incumbent, in which case he must also shew a title in the stranger.(*f*) Plenarty by the presentation of the plaintiff himself is a good plea, and it is not necessary to state that the plenarty was for six months before the purchase of the writ, for it shews that the plaintiff has already got the effect of his suit.(*g*) Whenever plenarty is pleaded, it should be shewn of whose presentation, and at what time.(*h*) Presentation, admission, and institution, make a sufficient plenarty against a common person.(*i*)

Plenarty shall not be intended if it is not pleaded(*k*), and if a *quare impedit* is brought against the patron and incumbent, after six months passed, and the defendants do not plead the plenarty, but rely on some matter in bar, which is found against them, the plaintiff may have judgment, and may remove the incumbent(*l*); and so where judgment is given upon a *nihil dicit*, and the bishop claims nothing.(*m*)

Plenarty in general is no plea against the king, for *nullum tempus occurrit regi*, and it is immaterial whether he claims the advowson *jure coronæ*, or in the right of a subject(*n*); but if the

(*a*) Thel. Dig. l. 11, c. 42, s. 22. Wats. Cl. Law, 277.

(*b*) Thel. Dig. l. 11, c. 42, s. 8.

(*c*) Thel Dig. l. 11, c. 42, s. 4.

(*d*) *Quære* the effect of the stat. 7 Anne, c. 18, on the plea of plenarty.

(*e*) Thel. Dig. l. 11, c. 42, s. 4, 5, 22.

(*f*) See *post*, in pleas by the clerk.

(*g*) Thel. Dig. l. 11, c. 42, s. 20. Br. Qu. Imp. 126.

(*h*) Thel. Dig. l. 11, c. 42, s. 4. Com. Dig. Plead. (3 L. 8).

(*i*) Hall's case, 7 Rep. 26, a. Boswell's case. 6 Rep. 49, a. Wood's Inst. 20, 156. Wats. Cl. Law, 277.

(*k*) Lovt v. Bp. of St. David's, W. Jones, 332.

(*l*) 2 Rol. Ab. 392, l. 10.

(*m*) Harris v. Austin, 3 Bulst. 38, 46. Wats. Cl. Law, 277.

(*n*) 2 Inst. 361. The queen & Abp. of York's case; 1 Leon. 226. Wats. Cl. Law, 277, 246.

defendant alleges a right of advowson in himself, he may plead plenarty for six months against the king (*a*), and plenarty is a good plea against the queen. (*b*) If the king confirms the estate of the incumbent, after he has been inducted, he cannot afterwards remove him by a *quare impedit*. (*c*)

In *quare impedit*.

By the patron.

Plenarty by wrongful collation had not at common law the effect of putting him who had right to present out of possession (*d*), and therefore it is no plea in a *quare impedit* to present.

The patron may also plead a release in bar, as a release of all actions, real or personal (*e*); but where there are several coparceners seised of an advowson, and one of them releases to the usurper's clerk all demands, actions, and wrongs, this only bars the releasor. (*f*)

The patron may also plead in bar a title in himself, traversing, where it is necessary, the title, as alleged by the plaintiff. Where the defendant has presented, and his clerk has been actually admitted, instituted, and inducted, it is only necessary for him to deny the plaintiff's title, without alleging any in himself, for the plaintiff in *quare impedit*, as in ejectment, must recover on the strength of his own title; and it is only requisite in such case to put the plaintiff to the proof of his title. But where the defendant's clerk is not admitted, both parties become actors, and the defendant must shew a title in himself, otherwise, if he succeeded, he could not have a writ to the bishop. (*g*) The case of the Queen and Middleton (*h*) is illustrative of the first point. There the defendant pleaded a lease from the queen's ancestors to A., and that during A.'s possession, B. a stranger presented the defendant, who was admitted, instituted, and inducted, without shewing any title in B.; this was held a good plea, because the title to present was shewn to be out of the queen, and it was unnecessary for the defendant to state a title, as he was parson *imparsonee* and in possession.

The true rule with regard to traversing the plaintiff's title in *quare impedit*, is laid down by Vaughan, C. J. in the case of

(*a*) Thel. Dig. l. 11, c 42, s. 7, 17.

(*b*) 2 Inst. 361, but see Co. Litt. 133, a.

(*c*) King v. Matthew, 1 Brownl. 166. Wats. Cl. Law, 246.

(*d*) Green's case, 6 Rep. 29, b. 30, a. Boswell's case, *ibid.* 50, a. 1 And. 243. Queen and Abp. of York's case, 1 Leon. 226. Com. Dig. Pleader, (3 I. 8).

(*e*) Doctr. Pl. 8. Co. Litt. 285, a.

(*f*) Countess of Northumberland's case, 5 Rep. 97, b.

(*g*) Tufton v. Temple, Vaugh. 7. Digby v. Fitzharbert, Hob. 104.

(*h*) 1 Leon. 44.

In *quare impedit.*

By the patron.

Tufton v. Temple. (*a*) That where the defendant traverses any part of the plaintiff's count or declaration in a *quare impedit*, it ought to be such part as is both inconsistent with the defendant's title, and being found against the plaintiff, absolutely destroys his title. In illustration of this rule Lord Vaughan cites two cases, the first in the Year Book, 10 H. 7, 27, where in a *quare impedit* the plaintiff declared, that he presented such a one his clerk, who was admitted, instituted, and inducted, that the church became void, and that he ought to present. The defendant pleaded that his ancestor was seised of a manor to which the advowson was appendant, and presented, that the manor descended to him, and the church being void, he presented; and he traversed, *absque hoc*, that the advowson was in gross. It did not appear whether any seisin in gross was alleged in the declaration; but whether it were so or not, Vaughan held that the traverse was bad, because, although such seisin in gross was inconsistent with the defendant's title, yet the traverse of it did not destroy the plaintiff's title, which should have been done by traversing the plaintiff's presentation. It has been before observed, that previous to the statute, 7 Anne, c. 18, a person who presented by usurpation to a church, and whose clerk was admitted and instituted, gained the fee of the advowson by wrong, and acquired a tortious title, of which he could not be deprived in a *quare impedit*, which was only a possessory remedy. It is evident, therefore, that by the presentation alleged in the plaintiff's declaration, he might have gained a title sufficient to justify him in presenting on a vacancy, until the defendant (if the plaintiff's title was wrongful) restored himself to his estate by a writ of right of advowson. The title then which the plaintiff had acquired by *presentation*, and, which, even though tortious, was sufficient in *quare impedit*, should have been traversed, and not the seisin in gross. The second case cited by Vaughan, is the Lord Buckhurst's case (1 And. 269), in which the plaintiff declared for a disturbance to the vicarage of Westfield, and alleged that the vicarage was appendant to the rectory of Westfield; whereof he was seised in fee, and presented Maurice Sackvile, his clerk, who was admitted, instituted, and inducted. The bishop pleaded, that before the writ purchased, one Richard, Bishop of Chichester, his predecessor, was seised in fee of the

(*a*) Vaughan, 8.

advowson of the said vicarage, as in gross, and collated to the vicarage, being void, one Maurice Berkley, who was inducted, and then shewed himself seised of the advowson, and that the church was void, and traversed, *absque hoc*, that the advowson of the said vicarage pertained to the rectory of Westfield *modo et forma*, as the plaintiff alleged. This traverse was held to be bad on the ground stated in the preceding case. Lord Buckhurst might have acquired a title by presentation, and therefore that title, and not the appendancy, which was immaterial, ought to have been traversed. Where the appendancy alone, however, forms the plaintiff's title to present, and is inconsistent with the title alleged by the defendant, it is then proper to traverse the appendancy; as in Sir Henry Gawdy's Case (Hob. 301), where Sir H. Gawdy brought a *quare impedit*, and declared that Sir R. Southwell was seised of the manor of Popenho, to which the advowson was appendant, and presented, and his clerk was instituted and inducted. That Southwell bargained and sold the manor to one Barrow, who being seised, the church became void by the death of Southwell's incumbent, and so continued for eighteen months, wherefore the Queen presented by lapse one Snell, and the plaintiff, by mean conveyances, derived the manor, to which the advowson was appendant, to himself, and alleged that by the death of Snell it belonged to him to present. The incumbent pleaded that he was parson by the Queen's presentation, and that long before Southwell had any thing in the manor, Queen Elizabeth was seised of the advowson in gross, in right of the crown, and presented Snell; that the advowson descended to King James, and he being seised, and the church becoming void by Snell's death, presented the present incumbent, who was instituted and inducted, and the plaintiff traversed, *absque hoc*, that the advowson was appendant to the manor of Popenho. This traverse was held good, for the plaintiff had no other title to present, than that which resulted from the appendancy of the advowson to the manor.

In *quare impedit*.

By the patron.

The rule drawn from this case by Vaughan, is that where the plaintiff counts upon a seisin of a manor to which an advowson is appendant, and states a presentation *by virtue of the appendancy*, it is sufficient to traverse either the appendancy or the presentation, for if the presentation was by virtue of the appendancy, there could be no usurpation gained by such a presentation. (*a*)

(*a*) Vaughan, 15.

In *quare impedit.*

By the patron.

It should be observed that the cases of 10 Hen. 7, 27, and the Lord Buckhurst's case, though rightly decided at the time, seem not to be law now, since by the stat. 7 Anne, c. 18, no wrongful estate in fee can be acquired by usurpation. It is however still necessary to allege a presentation in a declaration in *quare impedit*, without which the plaintiff's title is insufficient, and therefore such presentation may still be traversed, where in fact there has been no presentation, according to the rule given by Vaughan, C. J. at the conclusion of the case of Tufton v. Temple, that in all cases of *quare impedit*, the defendant may safely traverse the presentation alleged in the plaintiff's count, if the matter of fact will admit him so to do, for the plaintiff has no title without alleging a presentation in himself, his ancestor, or those from whom he claims the advowson, but the defendant must not traverse the presentation alleged, when there was a presentation, for then the issue would be found against him. (*a*)

In the same manner as the presentation, which is a material part of the plaintiff's title, may be traversed, so any other material part of his title may be denied, but in case one portion of the plaintiff's title is confessed and avoided, then the part only which is not confessed and avoided can be traversed. And when all the plaintiff's title is confessed and avoided, as where the defendant alleges a seisin and presentation subsequent to the presentation alleged by the plaintiff, no traverse at all ought to be taken (*b*), according to the rule delivered by Vaughan, C. J. that such part of the plaintiff's title only must be traversed, as is inconsistent with the defendant's title. If when the defendant confesses and avoids the plaintiff's title, he traverses any part of it, such traverse is an immaterial traverse, and may be passed over, and another traverse taken. (*c*) Thus in a *quare impedit* by the king, for the next turn in a living, void by promotion, if the defendant confesses and avoids, by pleading that the crown presented A., who is since dead, and alleges that he himself was subsequently presented, and is parson *imparsonee*, in that case it is improper to traverse the vacancy of the church by promotion. (*d*) So also where the defendant makes title by reason of a simoniacal presentation by

(*a*) Vaugh. 17.

(*b*) Fitz. Ab. Quar. Imp. 77. Vaugh. 16.

(*c*) R. v. Archbishop of Armagh, 2 Str. 838. Com. Dig. Pleader, (G. 3). and see Digby v. Fitzharbert, Hob. 101.

(*d*) R. v. Archbishop of Armagh, 2 Str. 838.

the plaintiff, he confesses and avoids the plaintiff's title, as far as relates to the seisin in gross or appendancy, as the case may be, and therefore he cannot traverse that part of the title; but as something further is necessary to entitle the plaintiff to present, viz. a vacancy, either by death, resignation, or deprivation; and as such title is contrary to the title of the defendant, who asserts that the church is void by simony, and not by any of the other modes, in that case he should traverse the vacancy alleged by the plaintiff. (*a*) In *quare impedit.* By the patron.

When the defendant has pleaded and set out a title in himself, and traversed the plaintiff's title, the latter cannot desert his own title and controvert the defendant's, by traversing the title alleged in the plea; for the consequence might be that he would recover on the weakness of his adversary's claim, and not on the strength of his own; and this rule holds, even where the king is plaintiff. (*b*) But where the king's title appears by office found, or other matter of record, there the king may relinquish his title, since it is established by record, and traverse the defendant's title. (*c*)

Where it is necessary in a *quare impedit*, for the defendant, not only to deny the plaintiff's title, but likewise to set out a title in himself, which is the case whenever he wishes to have a writ to the bishop, he must plead with a special traverse *absque hoc*, &c. By this means he is enabled to state in the inducement to his traverse, the title upon which he relies; but whenever a writ to the bishop would be unnecessary, from the circumstance of his clerk being already admitted and instituted, it seems to be sufficient for the defendant, directly to deny such part of the plaintiff's title as he may think proper, without a formal special traverse.

3. Pleas by the Incumbent.—The clerk, like the other defendants, may plead the general issue *ne disturba pas*, upon which the plaintiff may either have judgment and a writ to the bishop, with a *cesset executio*, till the other issues are tried; or he may maintain the disturbance and proceed for his damages. (*d*) By the clerk.

(*a*) Penner v. Nicholson, Cro. Car. 61. Vaugh. 16.

(*b*) R. v. Bp. of Worcester, Vaugh. 60, 61,

(*c*) *Ibid.* 62. Com. Dig. Pleader, (G. 19).

(*d*) R. v. Bp. of Worcester, Vaugh. 58. Hob. 162.

In *quare impedit.*

By the clerk.

The clerk may plead in abatement the non-joinder of the patron. (*a*)

At common law, the incumbent could not have pleaded any plea which concerned the right of patronage, in which he had nothing; but the statute 25 Ed. 3, c. 7, enacts, that the possessor, that is, the incumbent, shall be allowed to counterplead the king's title, and to have his answer, and to shew and defend his right upon the matter, although he claim nothing in the patronage; and by equity, he may have this plea against common persons. (*b*) The statute uses the word *possessor*, and a question therefore arises, as to what makes the clerk a possessor. The church is full as against a common person when the clerk is admitted and instituted, while induction is required to make a plenarty against the king. In Hall's case, it is said to be sufficient to bring the incumbent within the statute, if when the action is by a common person, he has been admitted and instituted; while it is necessary, in a *quare impedit* by the king, that the clerk should be admitted, instituted, and inducted. In the case of Battaile v. Cook (*c*), however, it was held, that even in the case of a common person, the clerk cannot be said to be the *possessor* until he has been inducted; and with this opinion that of Lord Hobart coincides. (*d*) It may, however, be contended, that as the clerk is allowed to counterplead the title of a common person, by the equity of the statute, he shall by the same equity, be allowed to plead when he has such a possession as renders the church full as against the plaintiff. If the clerk resigns, or is made a bishop, pending the writ, he is not entitled to plead under this statute. (*e*) If the incumbent pleads to the title, it is said by Hobart, C. J. that he must as well shew and defend his own right, as counterplead his adversary's. (*f*) This is requiring from the incumbent something more than the patron himself

(*a*) Hall's case, 7 Rep. 25, b.

(*b*) Hall's case, 7 Rep. 26, a. Wats. Cler. Law, 278.

(*c*) Dyer, 1, b. and also per Dyer, 3 Leon. 47; and see Wats. Cler. Law, 279.

(*d*) Elvis v. Abp. of York, Hob. 319. The form of pleading also favours this opinion, for the plea always states, that the clerk is parson impersonee, which implies induction; but he need not say, that he was parson impersonee before the writ purchased. Het. 17, 18.

(*e*) *Ibid.* Dyer, 1, b. margin.

(*f*) Hob. 319, but see the Queen & Middleton's case, 1 Leon. 45. in which the incumbent was allowed to shew the title out of the queen, without alleging any in himself.

In *quare impedit.*

could be called upon to do; for where his clerk has already been admitted, and instituted, we have seen, that it is sufficient for the patron to deny the plaintiff's title without shewing any in himself. (*a*)

The incumbent may plead, that he is parson imparsonee of the presentation of such a one, and in this plea he ought to maintain his own title, and that of the patron by whom he alleges the presentation. (*b*) And it is not sufficient for the incumbent to state, that the church has been full of him for six months by the presentation of a stranger, without shewing a title in such stranger (*c*); but he may say, that he is in of the plaintiff's own presentation, or by collation by lapse to the ordinary, without setting out any title (*d*); and the clerk may say, that he is in of the presentation of another person than of him who is sued as patron with him, for the plea of the one does not estop the other. (*e*) The incumbent cannot plead plenarty generally, for it is not properly a plea to the action; nor is it such a counterplea to the plaintiff's title, as is within the statute 25 Ed. 3, c. 7. (*f*) If the incumbent resigns pending the writ, he can no longer plead to the title under this statute; though he may still plead as he might have pleaded at common law. (*g*)

When the incumbent pleads, that he is parson imparsonee of the presentation of such a one, the plaintiff may reply, that he is not parson imparsonee, or may allege, that he is in of the presentation of another person, and traverse the presentation alleged by the clerk. (*h*)

It is said, that if the incumbent's plea be found for him, he shall not be removed, although other pleas be found for the plaintiff. (*i*)

(*a*) The reason seems to be, because under the statute 25 Ed. 3, the incumbent is not only to counterplead the plaintiff's title, but "to shew and defend his own right."

(*b*) Elvis v. Abp. of York, Hob. 320. W. Jon. 4, S. C.

(*c*) Cranwell v. Lester, 1 Brownl. 162, S. C. Noy, 30.

(*d*) Noy, 30.

(*e*) Hob. 320, 321.

(*f*) Br. Ab. Plenarty, 6, 9, 12. *Qu. Imp.* 134. Fitz. Ab. *Qua. Imp.* 48. Grindon's case, Plow. Com. 501.

(*g*) Elvis v. Abp. of York, Hob. 319.

(*h*) Hob. 321. W. Jon. 5.

(*i*) Wallop v. Murray, 1 Brownl. 162. Wats. Clerg. Law, 286.

In waste.

Nul waste fait.

The general issue in an action of waste is *no waste done.* (*a*) This plea admits nothing, but puts the whole declaration in issue, and therefore the plaintiff must prove his title as laid in the declaration, and also the kind of waste stated in it; so that if the waste, alleged in the declaration, be in *cutting* trees, and the jury find that the defendant *stubbed* them, it will be a variance. (*b*) Upon *nul waste*, the defendant may give in evidence any thing that proves no waste to have been committed; as that it happened by tempest, lightning, enemies, or the like (*c*); or that the lessor himself committed the waste. (*d*) But matter of justification or excuse cannot be given in evidence under this plea (*e*); and, therefore, where the defendant has cut timber for repairs, or for necessary botes, and used it accordingly, this must be specially pleaded. (*f*) The plaintiff may plead as to part, *nul waste fait*, and as to the residue, a special justification. (*g*) If a stranger bring an action of waste against tenant for life, and he plead *nul waste*, it is a forfeiture. (*h*)

Pleas to the title.

The pleas in waste to the plaintiff's title, are either in abatement or in bar; in abatement, where the title is wrongly stated; and in bar, where it is denied. Thus it is a good plea in abatement where the plaintiff entitles himself to a reversion in fee by descent, to say that the ancestor devised to him in tail; and in this case the descent ought not to be traversed. (*i*) It is a good plea in bar, to shew, that the reversion has been devested out of the plaintiff; but where the action is brought by the lessor against the lessee, the latter cannot plead generally, that the plaintiff has nothing in the reversion; but must shew how it has been devested (*k*), on account of the privity subsisting between them; but "nothing in the reversion," is a good plea when the action is brought by the assignee of the reversion. (*l*) If the plaintiff's title fails pending the suit, it may be pleaded *puis darrein continuance*, (*m*) as where the plaintiff becomes tenant in tail after pos-

(*a*) Co. Ent. 700, a. 708, a. 2 Lutw. 1545. Godb. 209.

(*b*) Leigh v. Leigh, 2 Lutw. 1547. 2 Saund. 238, (note).

(*c*) Co. Litt. 283, a. *Ante*, p. 121.

(*d*) 5 H. 4, 2, b. See *ante*, p. 120.

(*e*) Com. Dig. Pleader, (3 O. 7).

(*f*) Co. Litt. 283, a. Dyer, 276, a. Co. Ent. 703, a. 2 Lut. 1546. *Ante*, p. 118.

(*g*) Co. Ent. 702, 3.

(*h*) Co. Litt. 252, a.

(*i*) 2 Lutw. 1557. Com. Dig. Pleader, (3 O. 10).

(*k*) Co. Litt. 356, a.

(*l*) Co. Litt. 356, a.

(*m*) Ewer v. Moile, Yelv. 141. Spink v. Tenant, 1 Roll. Rep. 106.

sibility of issue extinct. To destroy the plaintiff's title, the defendant may also plead a mean remainderman still alive. (*a*) In waste.

As the defendant may deny the plaintiff's title, so he may also deny his own liability, as stated by the plaintiff; thus when sued as assignee of the original tenant, he may plead no demise made to the latter, or no demise as to part (*b*); or that the wood was excepted in the demise (*c*); or that he has nothing by the assignment of such a one. (*d*) So the tenant for life or years may plead that after the demise he assigned, before which assignment no waste was done (*e*); to which plea the plaintiff may reply, that the assignment was by fraud, and that the defendant afterwards took the profits; and the defendant in his rejoinder must traverse the taking of the profits, and not the fraud. (*f*)

The defendant may plead in justification, that he took the trees, &c., for repairs (*g*); but it is not sufficient to say, that the defendant *took* them for repairs, unless it be added, that he *used*, or at least keeps them for repairs; for though he might, at first, have taken them for repairs, yet, perhaps, he afterwards sold them. (*h*) So the defendant may plead, that he took them for necessary botes, as for fire bote (*i*), wain bote, cart bote, or plough bote (*k*); or for gates, stiles, &c. (*l*); or for making utensils of husbandry (*m*), or for hedge bote. (*n*) Repairs, &c.

It is a good plea in excuse, that the defendant repaired before action brought, for the jury must view the waste, which of course they cannot do if it has been repaired; but if the repairs were after the commencement of the action, this plea cannot be pleaded. (*o*) The defendant may also plead, that the building was so ruinous at the time of the demise, that he could not maintain or repair it, and therefore he took it down and rebuilt

(*a*) Winch. Ent. 1019, (1132).

(*b*) Co. Ent. 697, b. Com. Dig. Pleader, (3 O. 18).

(*c*) Winch. Ent. 1062, (1176). Goodright, dem. Peters v. Vivian, 8 East, 190.

(*d*) Winch. Ent. 1062, (1176).

(*e*) Co. Ent. 697, b. See *ante*, p. 111.

(*f*) Stat. 11 Hen. 6, c. 5. Booth's case, 5 Rep. 77, a. Co. Ent. 698, a. F. N. B. 59 C. *Ante*, p. 112.

(*g*) Co. Ent. 703, a. Winch. Ent. 1069, 1067, (1142, 1182, edit. 1680).

(*h*) Danby v. Hodgson, 3 Lev. 323. Co. Litt. 54, b. *ante*, p. 118, but *quære* as to keeping the timber. Gorges v. Stanfield, Cro. Eliz. 593; and see Doe dem. Foley v. Wilson, 11 East, 56.

(*i*) Co. Ent. 703, a. Co. Litt. 53, b.

(*k*) Winch. Ent. 1080, 1055, (1144, 1169).

(*l*) *Ibid.* 1031, (1145). Co. Litt. 53, b.

(*m*) Winch. Ent. 1055, (1169). 2 Rol. Ab. 823, l. 22.

(*n*) Co. Ent. 703.

(*o*) Whelpdale's case, 5 Rep. 119, b. 2 Inst. 307. Co. Litt. 53, a.

In waste.

it (*a*): or he may plead, that it was so ruinous at the commencement of his lease, *quod reparari non potuit* (*b*); and so he may say, that the trees cut down, were *aridæ, mortuæ, nec fructum nec folia portantes;* but it is not sufficient to say, that they were *aridæ, in columnis putridæ, cavæ, anglice* pollards, *non habentes sufficiens mahremium pro aliquibus ædificiis.* (*c*)

Without impeachment of waste.

The tenant may plead, that his lease is without impeachment of waste (*d*); or that the plaintiff's ancestor made a bargain and sale of the trees to him (*e*); or, that the lessor covenanted in the deed of demise, that the defendant might cut down trees. (*f*)

Release.

The defendant may plead a release from the plaintiff; where the action is in the *tenuit,* and brought by two, a release by one is a bar to both; but otherwise, where it is brought in the *tenet,* for there it only bars the plaintiff, who releases. (*g*)

Accord and satisfaction.

Accord and satisfaction, is a good plea in an action of waste in the *tenuit,* where damages only are to be recovered; or in an action of waste against tenant for years in the *tenet,* for there a chattel only is recovered. (*h*)

In *quod permittat.*

It has already been said, that when a *quod permittat* is brought in the *debet,* or in the nature of a writ of right, the mise may be joined on the mere right (*i*); but where it is brought in the nature of a writ of entry, the defendant must plead specially, according to the nature of his case. Thus in a *quod permittat,* in the nature of entry *sur disseisin* of a common, the defendant may plead, that the land is in severalty, and traverse the disseisin (*k*); and so if it be brought in the nature of a writ of entry for disturbance of a right of common or way, the defendant may traverse the prescription, &c. (*l*)

(*a*) Wood and Avery's case, 2 Leon. 189. Co. Litt. 53, a.

(*b*) Winch. Ent. 1045, (1159). Ward v. Dettensam, Moor, 54.

(*c*) Com. Dig. Pleader, (3 O. 13). Mauwood's case, Moor, 101.

(*d*) 2 Rol. Ab. 835, l. 10, 15. *Ante,* p. 120.

(*e*) Win. Ent. 1043, (1157).

(*f*) Cage v. Paxlin, 1 Leon. 117. Moor, 23. Hard. 113.

(*g*) 2 Inst. 307. Com Dig. Pleader, (3 O. 8, 16).

(*h*) Peytoe's case, 9 Rep. 78, a, b. Alden v. Blagne, Cro. Jac. 100. Sacheverell v. Bagnol, Cro. Eliz. 356. Co. Ent. 707, b.

(*i*) *Ante,* p. 41.

(*k*) Rast. Ent. 539, a. Booth, 239.

(*l*) Rast. Ent. 538, b.

In *quod ei deforceat.*

A *quod ei deforceat*, being an action brought by tenant for life, &c., to recover lands which he has lost by default in a real action (*a*), the defendant may plead such former recovery in bar, maintaining his title at the close of his plea; as if the recovery was by *formedon*, he must say, "and he is ready to maintain his right and title aforesaid, by the gift aforesaid, &c., wherefore he prays judgment, &c." and the demandant may either traverse the title or plead in bar of it. (*b*) If the former recovery is pleaded, the defendant in the *quod ei deforceat* becomes an actor, and the demandant may then vouch. (*c*) The defendant, however, is not obliged to plead the former recovery, and may plead any other matter sufficient to bar the demandant. (*d*)

In *nuper obiit.*

In a *nuper obiit*, the demandant may plead in bar a feoffment from the common ancestor, and traverse that he died seised. (*e*)

In partition.

The usual plea in bar in partition is *non tenent insimul et pro indiviso* (*f*); and to a declaration stating a demise to the defendants, *non dimisit* is not a good plea, for it amounts to *non tenent insimul.* (*g*) Nor can the defendant plead another writ of partition depending, brought by him against the plaintiff. (*h*)

In *deceit* for impleading lands in ancient demesne in the king's court.

The defendant may plead the general issue, *not guilty*, although matter of record is mixed with matter of fact. (*i*)

If issue be joined, whether the manor is ancient demesne or not, it shall be tried by doomsday book. (*k*) The book of doomsday ought to prove the very manor to be ancient demesne, as it is alleged; for if issue be upon the manor of B., in the county of N., if doomsday has it the manor of B., in the county of L., it is not sufficient. (*l*) If it be not under the title *de terrâ regis* there,

(*a*) *Ante*, p. 132.
(*b*) 2 Inst. 352. Rast. Ent. 537, b: Booth, 255.
(*c*) 2 Inst. 351, and see in "Voucher."
(*d*) 2 Inst. 352.
(*e*) Rast. Ent. 441, a. Booth, 206.
(*f*) Co. Ent. 414, b. Com. Dig. Pleader, (3 F. 3). Booth, 246.
(*g*) Cocks v. Coombstocks, 1 Brownl. 157.
(*h*) Mill v. Glemham, 1 Brownl. 158.
(*i*) Com. Dig. Pleader, (2 H).
(*k*) Case of the Abbot of Strata Marcella, 9 Rep. 31, a. Com. Dig. Anc. Demesne, (F. 7)
(*l*) Hob. 188.

it is not ancient demesne. (*a*) If the question be, whether the land be *parcel of a manor* in ancient demesne, the trial shall be by jury. (*b*) And in an assise, ancient demesne is tried by the recognitors of assise. (*c*)

In *warrantia chartæ.*

There are some pleas in this action, which, admitting the obligation of the defendant to warrant the lands to the plaintiff, go only in excuse of damages and execution; such is the plea, that the plaintiff has not yet been impleaded, in which case, the plaintiff is entitled immediately to judgment to recover his warranty; but not to damages. (*d*) So also if the defendant pleads *riens per descent*, it is a confession of the warranty, and the plaintiff may have judgment, *pro loco et tempore*, immediately. (*e*)

Any plea which shews that the plaintiff is not entitled to take advantage of the warranty, is a good plea in bar in this action, as that he was not tenant of the land on the day of the writ purchased (*f*); but it is sufficient if he be tenant by admittance, as a vouchee. (*g*) So the defendant may plead, that nothing passed by the deed upon which the plaintiff has declared; for if nothing passed by the deed, the warranty does not bind (*h*); and this plea of *non dedit non concessit*, &c., is the general issue in the action. (*i*) Upon the same principle, the defendant may plead, that the plaintiff is in of another estate than that to which the warranty is annexed; in which case the privity upon which this action is founded, is wanting. Thus if a person who has an elder title enters upon him who has the warranty, and the latter then enters upon the former and disseises him, and brings a *warrantia chartæ*, these facts may be pleaded to bar the plaintiff in that action. (*k*)

(*a*) Hunt v. Burn, 1 Salk. 57.

(*b*) Case of the Abbot of Strata Marcella, 9 Rep. 31, a. Hunt v. Burn, 1 Salk. 57.

(*c*) 2 Inst. 397. See form of declaration, plea, replication, and day given to produce doomsday, Herne's Plead. 93.

(*d*) F. N. B. 134 K. Roll v. Osborn, Hob. 23. 1 Rol. Ab. 474, l. 50; but see Br. Ab. Dam. 183; and see *post* in "Damages."

(*e*) Thompson v. Jackson, Noy, 149.

(*f*) 2 Roll. Ab. 810, l. 7. Hob. 21.

(*g*) Roll v. Osborn, Hob. 21. 2 Rol. Ab. 810, l. 15.

(*h*) Roll v. Osborn, Hob. 21. Moor, 860.

(*i*) Booth, 242. Co. Ent. 692, b.

(*k*) Rast. Ent. 398, b. Booth, 242. Roll v. Osborn, Hob. 26; and see in "Voucher," *post*.

Of View.

In many real actions the tenant may demand a view of the land in question, or, if a rent is to be recovered, a view of the land out of which it issues. In other actions, as in assise of *novel disseisin* and waste, the view is had by the jury. The reason of this proceeding is, that the tenant or jury may know with certainty what the demandant seeks to recover, and that the defence may be shaped accordingly.

When denied.

This being the ground upon which a view is granted, it is denied by the law in all cases in which the tenant has, without such a dilatory proceeding, a sufficient knowledge of the lands or tenements demanded from him. Therefore it is a good counterplea of view at common law to say that the tenant is in possession of the lands demanded, and of no other lands in the same vill. (*a*)

In actions brought on tenant's own wrong.

It is likewise denied in certain actions which arise out of the wrongful act of the tenant himself, who may reasonably be presumed to be cognizant of the nature and extent of the injury which he has himself committed. Thus it is denied in a writ of intrusion and of entry in the *quibus*, because the tenant is supposed by those writs to be in of his own wrong (*b*); but, if a feme sole disseises another, and takes baron, and the disseisee brings a writ of entry in the *quibus* against the baron and feme, in this case the baron shall have a view, because he was a stranger to the *tort*. (*c*)

But this rule does not extend to writs supposing a *tort*, where the tenant demands the view of another thing than that in demand, as in the case of a writ of entry *sur disseisin* of a rent, in which a view may be had of the land out of which the rent issues; though in this case, if it appear to the court that the tenant is tenant of the land out of which the rent issues, a view shall not be granted. (*d*)

In actions where there is privity of blood.

In actions in which there is a privity of blood between the demandant and the tenant, and the tenements in dispute have been

(*a*) Davis v. Lees, Willes, 347.

(*b*) 2 Rol. Ab. 725, l. 22, 23. Br. Ab. View, 10, but in *cui in vitâ* in the *per* view lies, Br. Ab. View, 104.

(*c*) Keilw. 126, b.

(*d*) 2 Rol. Ab. 726, l. 43, 45, 727, l. 21. Br. Ab. View, 10, 52. Booth, 39.

When denied.

the property of their common ancestor, each party is presumed to be equally cognisant of the tenements demanded; a view is therefore denied to the tenant in a *nuper obiit* (*a*), and in a writ of right *de rationabili parte.* (*b*)

In writ of right of dower.

It appears, that at common law, in a writ of right of dower, if the husband die seised of the land out of which the dower is demanded, the heir or any claiming under him cannot have a view, because he is presumed to be cognisant of the lands which the ancestor had at the time of his death, though, where the husband had aliened, at common law, view was grantable. (*c*) In the latter case view is taken away by stat. Westm. 2, c. 48.

In dower *unde nihil habet.*

The cases are contradictory with regard to the granting or denying a view in dower *unde nihil habet* (*d*), but the weight of authorities appears to be in favour of the denial. Many of the cases, probably, in which view has been granted in dower are cases of writs of right of dower, and not of dower *unde nihil habet.* (*e*) In the former case there is not the same objection to this dilatory proceeding, as in the latter, where the widow is wholly without a provision. At the present day the courts would probably be inclined to discountenance a demand of view in a writ of dower *unde nihil habet.* (*f*)

In other actions.

A view is denied in a *quod ei deforceat,* for the tenant must know by the former record what he then recovered, and what is now in demand (*g*); so in a writ of right of advowson, where there is only one church in the vill, and so where there are two, provided they be of different names. (*h*) In a *cessavit* on the *cesser* of the tenant, where the lord has had seisin by the hands of the tenant himself, no view lies, for, if the tenant has, with his own hands, rendered the services, he must know the object of the *cessavit* (*i*), but in a *cessavit* against the alienee of a tenant

(*a*) Br. Ab. View, 22, 102. F. N. B. 197 Q. 2 Reeves' Hist. 315 (note).

(*b*) F. N. B. 9 N, but in 15 H. 5, view was granted in a *rationabili parte,* because the ancestor did not die seised. *Ibid.*

(*c*) Bracton, 377, a. 2 Inst. 481, and see *post.*

(*d*) That view does not lie, see Br. Ab. View, 22. Fitz. Ab. View, 55. 2 Rol. Ab. 725, l. 20. Com. Dig. View, (B). 2 Inst. 481. Astmal v. Astmal, 2 Lev. 117, and see Dyer, 179, a. That view lies, see Bernes v. Rich, 3 Lev. 220. Co. Ent. 177, a. Clift's Ent. 299. Rast. Ent. 228, b. 232, b. 239, b.

(*e*) Astmal v. Astmal, 2 Lev. 117.

(*f*) 2 Saund. 44, a, (note).

(*g*) Booth, 37. Br. Ab. View, 14, 91.

(*h*) Davis v. Lees, Willes, 347. Ayre's case, 11 Rep. 22, a. 2 Rol. Ab. 728, l. 15. 2 Reeves' Hist. 315, but see F. N. B. 30 E, note (a.) *contra.*

(*i*) 2 Rol. Ab. 725, l. 28.

upon the *cesser* of the tenant, a view may be had. (*a*) In admeasurement of dower the defendant cannot have a view, for she cannot be miscognisant of the land which she holds in dower, and the action also is the consequence of her own act. (*b*) When denied.

By the statute of Westminster 2, (13 Ed. 1, c. 48.) it is enacted, that from thenceforth, view of land shall not be granted, but where view of land is necessary, as if one lose lands by default, and he who loses moves a writ to demand the same land. And in case where one, by an exception dilatory, abates a writ after the view of the land, as by non tenure, or misnaming of the town, or such like; if he purchase another writ, in this case (*c*), and in the case before mentioned (*d*); from henceforth the view shall not be granted, if he had the view in the first writ. In a writ of dower, where the dower in demand is of land, that the husband aliened to the tenant or his ancestor, when the tenant ought not to be ignorant what land the husband did alien to him or his ancestor, though the husband died not seised, yet from thenceforth view shall not be granted to the tenant. (*e*) In a writ of entry also, which is abated, because the demandant misnamed the entry (*f*), if the demandant purchase another writ of entry, if the tenant had view in the first writ, he shall not have it in the second. In all writs also, where lands are demanded by reason of a demise (*g*) made by the demandant or his ancestor to the tenant and not to his ancestor, as that which he leased to him, being within age, *non compos mentis*, in prison, and such like, view shall not be granted thereafter, but if the demise was made to his ancestor, view shall lie as it did before. When taken away by stat. of Westminster 2, c. 48.

It is provided at the commencement of the foregoing chapter of the statute of Westminster 2, that a view shall not be granted unless where it is necessary, and it is said by Willes, C. J. that the exceptions specified in the statute are not all the cases wherein a view ought to be denied, but that they are put for example's sake, and that the true rule is, that a view being a dilatory, shall not be granted, unless where a view is necessary; and that wherever it is plain that the tenant has sufficient knowledge

(*a*) *Ibid.* l. 40.

(*b*) 2 Rol. Ab. 727, l. 7.

(*c*) "This case" relates to the last words, "or such like," 2 Inst. 481.

(*d*) That is in the case of pleading non tenure, or the misnaming of the town. The words have no reference to the former clause, concerning *quod ei deforceat*, 2 Inst. 481.

(*e*) See *ante*, p. 248.

(*f*) See *ante*, p. 208.

(*g*) The word demise here is applied to an estate in fee simple, feetail, or for life, 2 Inst. 483.

When denied.

what it is that the demandant sues for, there a view shall not be granted. (*a*)

The first branch of this statute is to be understood of a *quod ei deforceat*, upon a recovery by default, which being a writ grounded upon a former record, the tenant has sufficient notice of the land in question, and upon this account neither party, privy, nor stranger, shall have a view in this writ. It is otherwise in a writ of right, brought upon a judgment by default, for that writ is not grounded upon the former record. (*b*)

Non tenure, and misnaming of the town, are only mentioned as examples of such dilatory pleas, as, where the first writ is abated, shall prevent the tenant from having a fresh view. (*c*) If the demandant is nonsuited, or discontinues in a new action, the tenant shall again have a view. (*d*) If a writ is brought against one, and abated for jointenancy after view, and a new writ is brought against him and another, they shall again have the view, because in the new writ a new person is joined, and so if more or less land be contained in the new writ. (*e*) If the first writ is brought in K. and the tenant pleads that the land extends into L. in a new writ for the lands in K. and L., though a new town be added, yet, because it was added by force of the plea of the tenant himself, he is ousted of view. (*f*)

The clause in the statute respecting writs of dower, does not extend to dower *unde nihil habet*, in which, as it seems, no view was grantable at common law. (*g*)

The last clause of the statute relating to writs of *dum fuit infra ætatem*, &c. does not extend to those writs when brought in the *per* and *cui*, and if any of these writs be brought for a rent, though the view be demanded of another thing than that in demand (*h*), yet by this statute it shall not be granted. (*i*) The alienations intended by this clause are only alienations *in pais*, and not by record, as a fine, &c. (*k*)

View ousted by plea.

When the tenant by his plea takes cognisance of the land, a view is denied. Thus in a *præcipe quod reddat*, in which view lies, if the tenant pleads in bar as to part, and as to the residue

(*a*) Davis v. Lees, Willes, 347. Br. Ab. View, 24.
(*b*) 2 Inst. 480.
(*c*) 2 Inst. 480, 1.
(*d*) 2 Inst. 480. 2 Rol. Ab. 729, l. 20.
(*e*) 2 Inst. 481. 2 Rol. Ab. 729, l. 22.
(*f*) 2 Inst. 481.
(*g*) 2 Inst. 481. *Ante*, p. 248.
(*h*) See *ante*, p. 247.
(*i*) 2 Inst. 482. Br. Ab. View, 28.
(*k*) 2 Inst. 483.

demands a view, he shall be ousted of the view, for by the plea in bar, he takes upon himself cognisance of the whole. (*a*) But in a writ of entry in the nature of an assise, of four acres of land, and twenty shillings rent, if the tenant pleads in bar for the four acres, yet he shall have a view of the land, out of which the rent is issuing, for of this land he does not take cognisance by the plea in bar. (*b*) In dower, when the tenant demands a view, and the demandant counterpleads it, alleging that the husband died seised, the tenant ought not to reply that the husband did not die seised of the *lands demanded*, for thereby he would take cognisance of the lands and oust himself of the view, but he ought to say that he did not die seised of any lands in the same vill. (*c*)

When denied.

With the exceptions before mentioned, and also with the exception of those actions in which a view lies by the jury, (*d*) the tenant in any real action, where he does not know the certainty of the lands in demand, may in general demand a view. (*e*) Thus it lies in a *formedon* (*f*), in a *curia claudenda* (*g*), in a writ *de consuetudinibus et servitiis* (*h*), in a *quod permittat* (*i*), in a *cui in vitâ* in the *per* (*k*), in admeasurement of pasture (*l*), in a *quo jure* (*m*), and in a writ *de rationabilibus divisis*. (*n*)

When granted.

The tenant may pray a view either before or after the demandant has counted. (*o*) Whether the tenant can have a view after a general imparlance has been much disputed. The reason of denying a view in this case appears to be, that as an imparlance is allowed in order to enable the defendant the better to inform himself of the cause of action, in order to his defence (*p*), he must therefore be presumed to have made himself acquainted during that time with the land demanded, or as it is expressed in the case in Dyer, he takes notice of the land upon himself. (*q*)

At what time prayed.

(*a*) 2 Rol. Ab. 727, l. 46. Br. Ab. View, 58.

(*b*) 2 Rol. Ab. 727, l. 51. Br. Ab. View, 58.

(*c*) Br. Ab. View, 9, 40. Booth, 41. The entry in Rast. 239, b. is incorrect.

(*d*) *See post.*

(*e*) Com. Dig. View, (A).

(*f*) 2 Rol. Ab. 725, l. 51. Davis v. Lees, Willes, 344.

(*g*) 2 Rol. Ab. 725, l. 54. Rast. Ent. 141, b.

(*h*) 2 Rol Ab. 726, l. 3.

(*i*) *Ibid.* l. 46, but in Palmer v. Poultney, 2 Salk. 458, it is said *the jury* shall have a view.

(*k*) Br. Ab. View, 104. 2 Rol. Ab. 727.

(*l*) Br. Ab. Admeasurement, 3.

(*m*) F. N. B. 128 K.

(*n*) F. N. B. 129 D.

(*o*) Br. Ab. View, 99. Davis v. Lees, Willes, 344. Wickham v. Enfield, Cro. Car. 351.

(*p*) Anon. 2 Show. 310.

(*q*) Dyer, 210, b.

At what time prayed.

View also is a dilatory proceeding, and for that reason, ought not, as it seems, to be granted after a general imparlance (*a*); at all events, it is much more safe to demand a view before imparlance. But where one tenant imparled, and another prayed a view, it was held by Fitzherbert that the latter should have the view notwithstanding the rule that defendants ought to agree in dilatories. (*b*)

After day taken by *prece partium*, the tenant cannot have a view (*c*), and so in a *præcipe quod reddat* against two, if one appears and the other makes default, and he who appears has *idem dies* given, and at the return of the grand cape both appear, and he who made default confesses the action, the other shall not have a view, because by the *idem dies* given he had time sufficient to take notice of the land. (*d*) In a *præcipe* against two joint-tenants, if one of them confesses the action, the other shall not, it is said, have a view, because it is a delay of the judgment, though this may be doubted, for the latter may, after the view, take upon himself the entire tenancy. (*e*) At the grand cape returned, if the demandant releases the default, the tenant may pray a view. (*f*) After plea to the action, a view cannot be had. (*g*)

Counterplea of view and judgment thereon.

The demandant may counterplead the view, where it is improperly demanded, as where the tenant has no other lands in the same vill. (*h*) So in dower, if the husband died seised, that is a good counterplea (*i*), and so under the statute of Westminster 2, c. 48, the demandant may counterplead the view where the husband has aliened the lands to the tenant or his ancestor. (*k*) Issue may be taken upon the counterplea. (*l*) If the tenant demur to the counterplea, and it is adjudged against him, the judgment is peremptory (*m*), if it be found for him it is that he have a view. (*n*)

(*a*) That view lies after imparlance, see Brook v. Groves, Hutt. 28, but the cases there cited do not appear to bear out that decision. Jenk. Cent. 130, the opinion of the Prothonotary in Dyer, 210, b. Booth, 39. That it does not lie, see Dyer, 210, b. Moor, 32. Gilb. Hist. C. P. Bacon's Ab. Pleas and Pleading, (C. 2.) and see Onslow v. Smith, 2 Bos. and Pul. 384, as to aid prayer after imparlance.

(*b*) Br. Ab. View, 1, 7.

(*c*) 2 Rol. Ab. 729, l. 36. Br. Ab. View, 23.

(*d*) 2 Rol. Ab. 730, l. 5.

(*e*) 2 Rol. Ab. 730, l. 10. Br. Ab. View, 68. Dilatories, 9. Dyer, 179, a.

(*f*) 2 Rol. Ab. 729, l. 32.

(*g*) 2 Rol. Ab. 729, l. 55.

(*h*) Davis v. Lees, Willes, 344.

(*i*) See *ante*, p. 248. Clift. Ent. 299. Whelpdale v. Whelpdale, 3 Lev. 168.

(*k*) Bernes v. Rich, 3 Lev. 220.

(*l*) Rast. Ent. 239, b.

(*m*) Com. Dig. Pleader, (2 Y. 3).

(*n*) Davis v. Lees, Willes, 344.

Writ of view.

Where a view is demanded, and granted, a writ of view may be sued out by the demandant for his own expedition, and it is his duty to point out the lands to the sheriff, in order that the latter may shew them to the party. (*a*) The writ of view commands the sheriff, that he cause the tenant to have a view of the lands, &c. demanded, and that he appoint four knights of those present at the view, to be before the justices at Westminster on the return day, to testify such view, and that he have there the names of those knights, and the writ, &c. (*b*) The sheriff must give notice to the viewers who need not really be knights, and to the tenant, of the time when view will be given, which may be at any time before the return of the writ of view. It may not be improper for the demandant's agent to serve the tenant or his attorney immediately with an appointment corresponding with the one made by the sheriff. The sheriff's summons should be served upon the tenant himself, if resident within the county, but if not, it can only be left upon the premises demanded, in which case the notice to the attorney will be peculiarly requisite. The demandant or his agent must be prepared to point out the land in question to the sheriff. The return will depend upon the tenant's attending or not attending, by himself or his agent, to take the view, which the demandant or his agent must be prepared to give with accuracy, and in exact conformity to the description in the writ. (*c*) There must be nine returns between the *teste* and return of the writ of view.

What may be put in view.

In an action for rent, the land out of which it issues may be put in view. (*d*) In a *quod permittat* of common appendant, a view may be had of the land in which the common is, and also of the land to which it is appendant (*e*); and so in a *quod permittat* of a way, a view may be had of a wall which obstructs the way, and of the way, and of the land to which it is appendant (*f*); so also in a *curia claudenda* for not enclosing a house adjoining to the house of the plaintiff, the defendant shall have a view of both the houses. (*g*) If land is demanded, and the view

(*a*) Booth, 40.
(*b*) *Ibid.*
(*c*) These directions were given by two eminent pleaders at the bar, see 3 Ch. Plead. 643.
(*d*) 2 Rol. Ab. 731, l. 8.
(*e*) Br. Ab. View, 10.
(*f*) *Ibid.* Brook v. Groves, Hutt. 28.
(*g*) 2 Rol. Ab. 730, l. 40.

What may be put in view.

is granted, every part of the land shall be put in view, and so when the demand is of a house, every parcel of the house shall be viewed (*a*); but in making view it is not necessary to shew every acre, for the demandant may shew the field, and say that he claims so many acres therein, and then another field, and so on. (*b*) If the demand be of a moiety of a manor, the tenant shall have the view of all the manor (*c*), but in making view of a manor, the scite with the appurtenances, shall be put in view, and not every parcel of the manor. (*d*)

In assise of an office the place where it is exercised shall be put in view of the jury. (*e*) Thus in assise of the office of one of the Philazers of the Common Pleas, the place where the plaintiff sate, when he was first admitted to the office, was put in view. (*f*)

Sheriff's return.

If all the parties attend upon the view, the sheriff's return is that he has caused the tenant to have a view of the tenements, &c. or that neither the tenant nor any one for him came to take the view, or that no person came on the part of the demandant to shew him the lands. In the former case the tenant loses the benefit of the view, in the latter an alias writ of view may be sued out. (*g*)

Proceedings after view.

Upon the return of the writ of view, the tenant is entitled to an essoign, and the demandant must count against the tenant at the adjournment day of the essoign, or if no essoign be cast, on the return of the writ of view. If the view has been prayed after the declaration, the demandant must count against the tenant, *de novo*. (*h*) After view the tenant is excluded from pleading certain pleas in abatement. (*i*)

View by the jury.

In certain actions, the jurors and not the tenant shall have the view. In an assise of novel disseisin, the writ commands the sheriff to summon a jury to view the premises, and to make recognition, &c. The sheriff accordingly issues his summons to the jurors, six of whom, at least, ought to view the land before

(*a*) 2 Rol. Ab. 731, l. 40, but see 1 Leon. 267.
(*b*) Br. Ab. View, 101, *quære inde*.
(*c*) 2 Rol. Ab. 731, l. 24.
(*d*) 2 Rol. Ab. 731, l. 43.
(*e*) 2 Rol. Ab. 731, l. 14. Br. Ab. Assise, 2. *Ante*, p. 66.
(*f*) Dyer, 114, b.
(*g*) Booth, 40. 2 Saund. 45, h. (note).
(*h*) Com. Dig. Pleader, (2 Y 3). Booth, 42. 2 Saund. 45, i, (note). Davis v. Lees, Willes, 345.
(*i*) Com. Dig. Abatement, (I. 27).

the taking of the assise. (*a*) The recognitors may be examined before the justices upon the *voir dire*, whether they have had the view, and if they have not, then the assise must be adjourned, and a day given to them to have the view, under a penalty of one hundred shillings. (*b*) In some cases a view need not be had in assise, as where the recognitors already know the land. (*c*) Of things not visible, as tithes, there cannot be a view, nor of an office which is universal and not annexed to any place (*d*); but in assise of an office *in certo loco*, the place where it is exercised shall be put in view, (*e*) as in the case already mentioned of an assise for the office of Philazer of the Common Pleas. (*f*) A man may make the view to the recognitors in assise from a place where he can see the land without approaching it, if he dare not approach for fear of death (*g*); and it is said, that if the jurors come near the land, and there is a hill between them and the land, so that they cannot see it, yet that the law adjudges this to be a sufficient view. (*h*)

View by the jury.

In assise of nuisance, before justices of assise, the jurors, and not the defendant, shall have the view, though it is otherwise when the writ is *vicontiel*. (*i*)

In a writ of waste, according to the practice before the statute 4 Anne, c. 16, s. 8, the jury ought to have a view of the place wasted, otherwise the trial shall be stayed (*k*); and if waste be assigned in several places the jury may find no waste done, in a place of which they have not had a view (*l*), and they ought, it is said, to have a view, though the issue be upon a collateral point and the waste is confessed. (*m*) If waste be assigned in a wood *sparsim*, it is sufficient if the jury view the wood, though they do not enter into it, and so if it be in several rooms of a house, it is sufficient if they have a view of the house generally. (*n*) According to the old practice, six jurors at least ought

(*a*) Br. Ab. Assise, 394. Booth, 282.

(*b*) Br. Ab. Assise, 394, 395. Dyer, 62, a.

(*c*) Br. Ab. View, 89. Dyer, 62, a.

(*d*) Per Coke, C. J. in Parson v. Knight, 2 Brownl. 268.

(*e*) 2 Rol. Ab. 731, l. 14. Br. Ab. Assise, 2. See *ante*, p. 66.

(*f*) Dyer, 114, b. John Webb's case, 8 Rep. 47, b.

(*g*) 2 Rol. Ab. 731, l. 52.

(*h*) Per Knightley, Dyer, 18, b.

(*i*) Per Belknap, Br. Ab. Nuisance, 6.

(*k*) Lut. 1558. Com. Dig. Pleader, (3 O. 21).

(*l*) *Per* Dyer, 1 Leon. 267.

(*m*) *Per* 2 Just. Glanv. *contra*. Lichfield v. Sandars, Noy, 5.

(*n*) 1 Leon. 267.

View by the jury.

to have the view in waste, and may be examined by the court, as in assise.(*a*) The practice with regard to granting a view in waste is now regulated by the statutes of 4 Anne, c. 16, s. 8, and 3 G. 2, c. 25, s. 14. (*b*)

(*a*) Greene v. Cole, 2 Saund. 254.

(*b*) See Tidd's Practice, 829. (7th. Edit.)

Of Voucher.

In general.

THE doctrine of voucher or warranty arises out of the obligation, under which, according to the feudal relation, the lord was supposed to lie, to defend his tenants' lands against all claimants. This obligation arose in various ways, either from the relation which existed between the lord and tenant, and which had existed between their respective ancestors beyond the time of legal memory, as in homage ancestral, or from the actual or implied engagement gathered from the terms of the conveyance, by which the land passed from the lord to the tenant. Thus an actual warranty is created by the word *warrantizo*, and an implied warranty by the word *dedi* in a feoffment. The doctrine of homage ancestral is now a dead letter. It was nearly worn out in the time of Sir Edward Coke, and was at length entirely abolished by the stat. 12 C. 2, c. 24. The obligation of warranty, arising by the act of the parties, however, still remains a part of our law, though much abridged, and fallen into great disuse. As it affects the doctrine of fines and recoveries, it is still a highly important branch of legal learning, but in this place it will only be discussed in so far as it is connected with the proceedings in real actions.

There are two modes of taking advantage of a warranty—1. By voucher, when the tenant is impleaded by a stranger, and 2, by rebutter, when he is impleaded by the warrantor or his heirs bound by the warranty.(*a*) With regard to the tenant's right to vouch the warrantor and his heirs, there appears to have been originally no distinction between lineal and collateral warranty.(*b*) In either case if the warrantor himself was vouched, he was bound to enter into warranty, and the heir in either case was subject to the same obligation, and was bound, provided he had assets to render in value.

The first statute restricting the operation of a warranty was

(a) Bole v. Horton, Vaugh. 385. Vaugh. 366.
(b) Gilb. Ten. 142. Bole v. Horton,

In general.

the statute of Gloucester, 6 Ed. 1, c. 3, whereby it is enacted that on an alienation by tenant by the curtesy, the son (or heir) shall not be barred by the deed of the father, from whom no inheritance descended, to recover by writ of *mortd'ancestor*(*a*), of the seisin of his mother, although the deed of his father contains a warranty against him and his heirs, and if lands of inheritance descend he shall be barred to the value of them. This statute would seem not materially to affect the doctrine of *vouching* to warranty. Before it was passed, the heir was only answerable, when vouched, to the extent of the lands descended, though he was *rebutted* from claiming the lands aliened, even when he had received no assets from the warrantor. It was in order to remedy the latter grievance that the statute was passed. It appears, however, that it affected the law of voucher, inasmuch as it excused the heir when he had no assets by descent from his father, from *entering into the warranty*, which if he should do, it was said he would foreclose himself of the action to which he was entitled, under the statute, and therefore by the rule of the court he did not enter into the warranty.(*b*) In this case the statute of Gloucester appears to have furnished a sort of counterplea of voucher. The next statute which restrained the general operation of warranty was the statute *de donis*, in the construction of which the judges held, in analogy to the statute of Gloucester, that a lineal warranty without assets should not bind the issue in tail. This statute therefore seems to have introduced no other alteration into the law of voucher, than the statute of Gloucester. The statute of 11 Hen. 7, c. 20, which was passed for the purpose of preventing the alienation by the wife, of the lands of her deceased husband, had a much more powerful operation than the statute of Gloucester, which restricted the power of tenants by the curtesy; for by the statute of Henry 7, all warranties made upon alienations within that act are declared to be void and of none effect, so that in such cases, voucher is entirely taken away. The last statute by which the operation of warranties has been restrained, is the statute for the amendment of the law, 4 Anne, c. 16, s. 21, whereby all warranties by tenant for life, the same descending or coming to any person in reversion or remainder shall

(*a*) Other real actions are within the stat. Co. Litt. 365, b. 2 Inst. 293.

(*b*) 2 Inst. 294.

be void and of non effect, and likewise all collateral warranties by any ancestor who has no estate of inheritance in possession, of the lands, shall be void against the heir. In general.

The many advantages which the personal remedy of an action of covenant possesses over the proceeding by voucher, or the writ of *warrantia chartæ*, very early induced purchasers to require personal covenants in their conveyances, in preference to warranties. By a covenant, the executors are bound though not named, while in a warranty in order to bind the heir it is necessary to name him. By a covenant, the purchaser can resort to the personal estate of the vendor after his death, upon which he can establish no claim by voucher. Again, where any one has a right to *enter* upon the lands purchased the tenant cannot avail himself of his warranty by way of *voucher*, since he cannot vouch where he is not impleaded. In addition to these reasons, the statutes which in certain cases declare warranties to be void, and the greater simplicity and expedition of the action of covenant fully account for the abandonment of the ancient form of warranty.

A warranty, which may be defined to be a covenant real, annexed to lands or tenements, whereby a man and his heirs are bound to warrant the same, and either upon voucher or in a writ of *warrantia chartæ* to yield other lands or tenements to the value of those lost (*a*), is either express or implied. An express warranty must be created by the word *warrantizo*, to which no other word in the law is tantamount. (*b*) A warranty in law may however be created by other words, as by the word *dedi* in a feoffment; and so an implied warranty is created by homage ancestral, and by the word *exchange*, in a deed of exchange. (*c*) So if a man makes a gift in tail or a lease for life, reserving a rent, a warranty in law is created (*d*), and when dower is assigned, a Warranty express or implied.

(*a*) Co. Litt. 365, a.

(*b*) Litt. sec. 733. Co. Litt. 384, a. Shep. Touch. 184.

(*c*) Co. Litt. 384, a. Gilb. Ten. 139, 141. 2 Rol. Ab. 743, l. 31. Bastard's case, 4 Rep. 121, a. "The warranty arising from an exchange is only a lineal warranty, for the law will not raise a collateral warranty because of hard consequences attending it; an alienee can neither enter nor vouch, but he may make use of the warranty in law by way of rebutter." *Per* De Grey, C. J. Provost of Eton v. Bishop of Winchester, 3 Wils. 496, and see Prest. Shep. Touchs. 290. Noy's Max. 61. Co. Litt. 384, b.

(*d*) Co. Litt. 384, b. Gilb. Ten. 140.

warranty in law is included.(*a*) An express general warranty does not destroy an implied general warranty.(*b*)

Who may vouch and be vouched.

As voucher is a right to call upon another person for a recompence, in respect of the privity between the vouchor and the vouchee(*c*), there are many cases in which voucher does not lie, because such privity is wanting. Thus in general, persons who come *in* in the *post* cannot vouch, as the lord by escheat and tenant by the curtesy.(*d*) And the same is said, though incorrectly, to be the law with regard to *cestui que use* (*e*); for it should be observed that there is a material distinction between a case where a man comes in by the limitation of the party, as *cestui que use*, and where he comes in purely by act of law, as the lord by escheat.(*f*) The necessary privity is destroyed when the vouchor takes another estate, than that to which the warranty is annexed, as where tenant in tail becomes seised in fee by discontinuance, and in this case, therefore, no voucher lies.(*g*) But though the tenant who is in in the *post* cannot vouch, he may yet, in general, rebut the warrantor if impleaded by him.(*h*)

Heir.

The heir of the warrantor is not bound to warranty unless he be named, except in cases of implied warranty.(*i*)

Assigns.

Where the warranty is to a man and his heirs, without mentioning assigns, the latter cannot vouch.(*k*) And if lands are warranted to A. and his assigns, the latter can only vouch during the life of A. for want of the word heirs.(*l*) The assignee of tenant for life, may take advantage of the warranty in law, arising on the lease and reservation of rent.(*m*) In the cases of implied warranty arising on gifts in tail and leases for life, such warranty is a consequence of tenure; and, therefore, when a man has a warranty to him, his heirs, and assigns, and makes a gift in tail, or a lease for life, then, although the donee or lessee

(*a*) Co. Litt. 384, b.

(*b*) Nokes's case, 4 Rep. 81, a. Cro. Eliz. 674, S. C. Shep. Touch. 185.

(*c*) Bole v. Horton, Vaugh. 384. Co. Litt. 385, a.

(*d*) Co. Litt. 385, b. note (1). Bole v. Horton, Vaugh. 391. Roll v. Osborn, Hob. 27.

(*e*) Smith v. Tyndal, 2 Salk. 685.

(*f*) Linc. Coll. case, 3 Rep. 62, b. And see Williamson v. Hancock, 1 Mod. 192; and Roll v. Osborn, Hob. 27.

(*g*) 2 Rol. Ab. 742, l. 42.

(*h*) Co. Litt. 385, a. Gilb. Ten. 137, 138. Linc. Coll. case, 3 Rep. 63, a. and see Bole v. Horton, Vaugh. 388.

(*i*) Co. Litt. 383, b. 384, a, b. Vin. Ab. Voucher, (L). Com. Dig. Garranty, (B).

(*k*) Co. Litt. 384, b. Vin. Ab. Voucher, (N).

(*l*) Co. Litt. 47, a. 2 Rol. Ab. 743, l. 47.

(*m*) Co. Litt. 384, b. Vin. Ab. Voucher, (N. 2).

may vouch the donor or lessor from whom he holds, yet he cannot as assignee vouch the original warrantor, because he does not hold of him; but if such gift in tail, or lease for life, be made, *the remainder over in fee*, the donee or lessee may vouch as assignee, because the whole estate is out of the lessor, and the particular estate and remainder make but one estate in judgment of law, the tenant of the particular estate holding not of him in remainder, but of the lord paramount. (*a*) An assignee of part of the land may vouch (*b*); but an assignee cannot vouch on the implied warranty on partition, though he may rebut. (*c*)

Who may vouch and be vouched.

The assignee of the donor or lessor, upon a gift in tail, or lease for life, rendering rent, is bound by the implied warranty. (*d*)

One coparcener regularly cannot vouch without the other (*e*); for together they make but one heir; and if two coparceners make partition, and one of them is impleaded, she cannot vouch alone, but must pray aid of her coparcener, and the two together must vouch (*f*): but if the partition be not the act of both, but of one only, as if one should alien her part, then the other may vouch alone; and so if one parcener make default upon aid-prayer. (*g*)

Coparceners.

Upon a warranty by the ancestor, one coparcener cannot be vouched without the other. (*h*) In gavelkind lands, all the brothers may be vouched as one heir, the eldest son being the heir upon whom the warranty descends at common law, and the younger brothers being vouched in respect of their possession. (*i*) And they ought all to be vouched together, in order to enable the special heirs to take advantage of the warranty paramount. (*k*) So the youngest brother having lands by descent in borough English may be vouched together with the heir at common law. (*l*)

If a warranty be made to two jointly, one alone cannot vouch

Jointenants.

(*a*) Co. Litt. 385, a. Com. Dig. Garranty, (C).
(*b*) *Ibid.*
(*c*) Bastard's case, 4 Rep. 121, b.
(*d*) Co. Litt. 384, b.
(*e*) 2 Rol. Ab. 742, l. 35.
(*f*) Roll v. Osborn, Hob. 26. Vin. Ab. Parcener, (O). And see in "Aid Prayer," *post.*
(*g*) *Ibid.*
(*h*) 2 Rol. Ab. 758, l. 25.
(*i*) 2 Rol. Ab. 747, l. 51. Br. Ab. Voucher, 119. Robins. Gavel. 127. Vin. Ab. Voucher, (U).
(*k*) Co. Litt. 376, b. Robins. Gavel. 123.
(*l*) 2 Rol. Ab. 748, l. 16. Rob. Gavel. 130.

Who may vouch and be vouched.

without the other; for voucher is given in lieu of an action, and in all actions jointenants ought to join (*a*); though jointenants may vouch severally upon shewing cause. (*b*) If one jointenant makes a feoffment of his part, the other may vouch severally for his moiety, since it was not by his default that the jointure was severed, though if partition was made between jointenants, the warranty was lost at common law. (*c*)

By statute 31 Hen. 8, c. 1, s. 3, by which jointenants and tenants in common may be compelled to make partition, each jointenant and tenant in common, after such partition made, and their heirs, may have aid of the others and their heirs, to the intent to dereign the warranty paramount, as between parceners.

So also jointenants ought to be vouched jointly, for they are jointly liable to render in value, and where two jointenants make a feoffment in fee, with an express warranty against them and their heirs to the feoffee and his heirs, and one of the feoffors dies, the survivor shall not be vouched alone, without the heir of the other, for the recompense in value shall be equally upon both. (*d*)

Tenants in common.

Tenants in common cannot vouch jointly. (*e*)

Voucher by tenant of himself.

There is one case in which the tenant may vouch himself, and that is when a man having a warranty, makes a gift in tail to his heir, and the latter, after his ancestor's death, is impleaded; in this case, it is said, that he must first vouch himself as heir to the donor, and then, as heir to the donor, vouch the original warrantor; for should he vouch the original warrantor, in the first instance, he would immediately recover a fee, and the estate tail would, it is said, be destroyed. (*f*)

Voucher of the demandant.

Although the demandant himself cannot, in general, be vouched, but ought to be rebutted, yet if the tenant cannot rebut him, he may vouch him with another, in order to recover in value. (*g*)

(*a*) 2 Rol. Ab. 759, l. 7. Br. Ab. Dilatories, 8.

(*b*) 2 Inst. 246.

(*c*) Roll v. Osborn, Hob. 25. Morrice's case, 6 Rep. 12, b.

(*d*) Co. Litt. 386, b. 2 Inst. 276. Br. Ab. Jointenant, 52, 59. Fitz. Ab. Voucher, 90. Harbert's case, 3 Rep. 14, a. but see Fitz. Ab. Voucher, 104, and Moor, 20. See also Vin. Ab. Voucher, (N. a). Com. Dig. Garr. (B).

(*e*) 2 Rol. Ab. 758, l. 34.

(*f*) 2 Rol. Ab. 742, l. 18, 746, l. 32. Vin. Ab. Voucher, (S. 5).

(*g*) 2 Rol. Ab. 747, l. 8. Vin. Ab. Voucher, (S. 6). See as to Voucher, after Aid Prayer, Vin. Ab. Voucher, (D. a).

In what actions it lies.

Voucher lies, in general, in all real actions (*a*), with certain exceptions. Thus voucher does not lie in an assise of *novel disseisin*, because it is *festinum remedium* (*b*); but the tenant may vouch a person who is named in the writ in assise, and present in court, and willing to enter into the warranty, for then no delay is incurred. (*c*) So in a writ of entry, in nature of an assise, the tenant can only vouch a person who is named in the writ. (*d*) And in writs of entry, brought in the degrees, no one can vouch out of the lien or degrees; that is, a person not named in the writ. (*e*) In dower against the heir of the husband no voucher lies (*f*); but in dower against the alienee of the husband, or of the heir, the latter may be vouched. (*g*) Voucher does not lie in a *quare impedit* for danger of a lapse. (*h*) Nor in a *super obiit*. (*i*) Nor in a *quod permittat*. (*k*) Nor in a writ of right *de rationabili parte*. (*l*) Nor in a *secta ad molendinum*. (*m*) Nor in ejectment of ward. (*n*) Nor in a *scire facias*, to execute a fine. (*o*) And in a writ of intrusion supposing that the tenant himself abated, if he says, that he is tenant for life, reversion to J. S., he cannot vouch J. S., because the writ is brought of his own wrong. (*p*) In partition the tenant cannot vouch, for the land is not demanded. (*q*)

In a *quod ei deforceat*, the tenant may vouch, and the demandant also, in certain cases, by force of the statute of Westminster 2, c. 4. The demandant can only vouch when he might have vouched as tenant in the prior action, in which he lost by default, and when the tenant in the *quod ei deforceat* pleads the former recovery; nor can the demandant vouch any other than the reversioner. The statute only gives one voucher, and there-

(*a*) Com. Dig. Voucher, (A. 1); and see Vin. Ab. Voucher, (Q).

(*b*) 2 Rol. Ab. 745, l. 21; but in *mortd'ancestor*, tenant may vouch at large. Br. Ab. *Mortd.* 61.

(*c*) F. N. B. 178 E. 2 Inst. 411. John Webb's case, 8 Rep. 50, a. Plowd. Com. 89.

(*d*) 2 Rol. Ab. 748, l. 41, 745, l. 23.

(*e*) West. 2, c. 40. 2 Inst. 243. Vin. Ab. Voucher, (S. 11). but in writs of entry in the *post*, the tenant may vouch at large. 2 Inst. 154. 2 Cruise Fines, 15.

(*f*) 2 Rol. Ab. 745, l. 13.

(*g*) Grey v. Williams, Dyer, 202, b. Bedingfield's case, 9 Rep. 18, a.

(*h*) 2 Rol. Ab. 744, l. 52.

(*i*) F. N. B. 197 Q.

(*k*) 2 Rol. Ab. 745, l. 15. Br. Ab. Quod Perm. 3.

(*l*) F. N. B. 9 N.

(*m*) Fitz. Ab. Voucher, 116.

(*n*) 2 Rol. Ab. 744, l. 51.

(*o*) 2 Rol. Ab. 745, l. 4.

(*p*) 2 Rol. Ab. 745, l. 17; and see *post* as to statute of West. 2, c. 40.

(*q*) Moor, 21.

In what action it lies.

fore the vouchee of the demandant cannot vouch over. (a) The voucher by the demandant, arises in consequence of a *quod ei deforceat* being considered as a revival of the former action.

When necessary to shew cause in voucher.

In general, the tenant may vouch without shewing cause; that is, without stating specially the circumstances which entitle him to the right of vouching, and the entry in that case is, that he comes in person, or by attorney, and defends his right, &c., and vouches to warranty, A. B., &c. (b) But when the tenant vouches out of the common course, as when he vouches himself as heir to the donor, in order to save his estate tail (c); or when two jointenants vouch severally (d); the special cause entitling the parties thus to vouch out of the common course must be stated. (e) The party vouching cannot vary from the special cause thus stated. (f)

Whenever the tenant cannot vouch without shewing cause, the demandant at common law may counterplead such cause. (g) Thus if the tenant vouches himself as heir to A., his sister, and shews for cause that A. gave to him in tail, it is a good counterplea that he never had any thing of the gift of A. though this is a counterplea to the warranty. (h) If the cause shewn be insufficient, the demandant may demur (i); thus if it appear upon the cause shewn, that the vouchee had nothing but a possession which has been defeated by recovery or lawful entry, no voucher lies. (k)

Counterplea of voucher.

As the proceedings in voucher were exceedingly dilatory, the demandant was, in certain cases, permitted to counterplead the voucher, that is, to shew some cause why the tenant ought to be deprived of his right of vouching; but as there were still many cases, in which great delays occurred, left unprovided for by the common law, several counterpleas are likewise given by statute. The person vouched also possesses the power of denying his obligation to enter into the warranty. When the objection is made by the demandant, it is called a counterplea

(a) 2 Inst. 352. Br. Ab. *quod ei def.* 16. Dr. Foster's case, 11 Rep. 62, b.
(b) Booth, 43.
(c) See *ante*, p. 262.
(d) See *ante*, p. 262.
(e) 2 Inst. 246. 2 Rol. Ab. 753. Vin. Ab. Voucher, (E. a). Booth, 48.
(f) 2 Rol. Ab. 768, l. 7.
(g) 2 Inst. 246.
(h) 2 Rol. Ab. 756, l. 1. As to counterplea to the warranty, see *post*; and see Vin Ab. Voucher, (F. a).
(i) 2 Rol. Ab. 755, l. 8. Booth, 49.
(k) 2 Rol. Ab. 755, l. 15.

to the *voucher*. When it proceeds from the vouchee, it is called a counterplea to the *warranty* or *lien*. (*a*) Counterplea of voucher.

The counterplea may be to the person either of the vouchor, or of the vouchee. Thus if the tenant vouches, it is a good counterplea that he is outlawed (*b*); or that the vouchee is dead (*c*); or that there is no such person *in rerum naturâ* (*d*); or that he who is vouched by a strange name, is the same person as the tenant. (*e*) If a man be vouched as son and heir to B., it is a good counterplea, that B. was attainted of treason or felony, if the parol be prayed to demur upon the voucher; for the vouchee, being an infant, cannot be bound by his own deed, nor, if B. was attainted, can he be bound by B.'s warranty (*f*); but it is otherwise where he does not take advantage of his nonage, for then he may be bound by his own deed. (*g*) Upon the same principle, if a man vouches J. S. within age, as heir to J. D., and prays the parol to demur, it is a good counterplea, that he is not heir to J. D., but that W. D. is. (*h*) If a man vouches another as son and heir of J. S., within age, and prays that the parol demur, it is a good counterplea, that he is of full age (*i*); but it is not any counterplea, that neither J. S. nor any of his ancestors was ever seised of the land, &c.; for though the heir cannot in this case be bound by his own deed, yet he may be bound by the deed of some other ancestor than J. S., and as the tenant may bind him by the deed of such other ancestor, the counterplea extends not to all whom the tenant may bind when the vouchee comes in, and therefore it is not a good counterplea. (*k*) In an action against a feme sole, it is a good counterplea, that pending the writ, she has taken baron; for otherwise, the demandant will be delayed since she and her baron ought to vouch. (*l*)

Before the statute of Westminster 1, c. 40, every tenant in a real action was permitted to vouch whomsoever he pleased, though neither the vouchee nor any of his ancestors had any Counterplea by statute.

(*a*) 2 Inst. 245. The *lien* signifies the obligation of the vouchee to enter into the warranty. Thus the vouchee used to demand *qui avez vous lier a garranty*; upon which the tenant shewed a deed, &c. 2 Inst. 243. Sometimes *lien*, or *line*, signifies the degrees in writs of entry.

(*b*) 2 Rol. Ab. 759, l. 44. *Sed quære.*

(*c*) 2 Rol. Ab. 759, l. 47.

(*d*) 14 Ed. 3, c. 18. 2 Inst. 245. 2 Rol. Ab. 759, l. 52.

(*e*) 2 Rol. Ab. 760, l. 1.

(*f*) 2 Rol. Ab. 760, l. 14.

(*g*) *Ibid.* l. 18.

(*h*) 2 Rol. Ab. 760, l. 26.

(*i*) 2 Rol. Ab. 760, l. 32.

(*k*) 2 Rol. Ab. 760, l. 35. Br. Ab. Counterplea *de vouch.* 27.

(*l*) 2 Rol. Ab. 761, l. 1.

Counterplea of voucher.

thing in the land, so as to enable him to make a feoffment to the tenant or his ancestors. The vouchee might then have vouched another in the same manner; and as there were nine returns upon every *summoneas ad warrantizandum*, the delay occasioned by these false vouchers was highly prejudicial to demandants. (*a*)

The first counterplea given by the statute of Westminster 1, c. 40, is, that the tenant or his ancestor, whose heir he is, was the first that entered after the death of him on whose seisin the demandant counts. This counterplea is expressly given by the statute in writs of possession, as in *mortd'ancestor*, *cosinage*, *aiel*, *nuper obiit*, intrusion, and other like writs; and is held to extend to writs of assise, of *novel disseisin*, and *darrein presentment*, and to a writ of right of ward (*b*); but not to a *formedon* in the descender, which is in the nature of a writ of right. (*c*) If tenant by receit, or a vouchee vouch, he is within the act, and subject to this counterplea. (*d*) The word ancestor by the equity of the act extends to predecessor. (*e*)

As the object of the statute merely was to prevent delays, it is provided, that in case the vouchee be in court, and will enter immediately into the warranty, the demandant shall not have the counterplea, or he may abandon the voucher and plead or vouch afresh. (*f*) If the first vouchee be present, and enter gratis into the warranty, the right of counterpleading the voucher of any subsequent person is preserved by the statute.

The second counterplea given by the statute of Westminster 1, c. 40, is, that neither the vouchee nor his ancestors had ever seisin of the land or tenement demanded; nor fee, nor service, by the hands of the tenant or any of his ancestors, since the time of him on whose seisin the demandant counts, until the time of the writ purchased, or the plea moved, whereby he might have enfeoffed the tenant or his ancestors. (*g*) This, which is the most usual counterplea, extends not only to the actions in which the first counterplea given by the statute may be pleaded, but also to all writs of right, and to writs of entry in the *post*. (*h*) The seisin of the ancestor, mentioned in this counterplea, is sufficient within the act, though it were avoided or determined; and it is sufficient though he had only an estate for years, for by the livery he gains a seisin, and feoffments both *de jure* and *de*

(*a*) 2 Inst. 240.
(*b*) 2 Inst. 241. Br. Ab. Counterplea *de vouch.* 28.
(*c*) 2 Inst. 241.
(*d*) *Ibid.*
(*e*) Br. Ab. Counterplea *de vouch.* 43.
(*f*) 2 Inst. 242. Booth, 50.
(*g*) This counterplea concludes to the country. Co. Litt. 126, a.
(*h*) 2 Inst. 243.

facto, are within the statute. So tenant for life, and a husband seised in right of his wife, have a seisin whereon to make a feoffment. (*a*) Counterplea of voucher.

If the tenant has a deed of warranty, and is ousted of his voucher, by either of the above counterpleas, it is provided by the statute, that he may still have his *warrantia chartæ*. The act does not affect counterpleas to the warranty or lien. (*b*)

As the demandant may counterplead the *voucher*, so the vouchee may counterplead the warranty, or his obligation to render in value. (*c*) Thus he may say, that the tenant has nothing in the tenancy (*d*); or is in of another estate than that upon which the warranty was created (*e*); that the feoffment was made by the vouchee to the vouchor, and a stranger and the heir of the stranger, who is alive and not joined in the voucher. (*f*) Counterplea by the vouchee of the warranty.

If a man is vouched and returned dead by the sheriff, the voucher must abate (*g*), and so if two are vouched and one of them is returned dead, it seems that the voucher shall abate, because the survivor shall not be charged for the whole. (*h*) If the tenant vouches, and the voucher is counterpleaded according to the statute, the tenant cannot say that the vouchee is dead, pending the issue, because if the counterplea is good, the demandant shall recover the land, which benefit shall not be taken from him by the plea of the tenant himself (*i*); and even if the sheriff returns the vouchee dead, yet the issue shall stand, for the death of a stranger to the issue shall not abate the issue (*k*); but if the counterplea be found false, then, if upon the process the vouchee is returned dead, the voucher shall abate. (*l*) Abatement of voucher and revoucher.

If the vouchee is returned dead, on the return of the *summonecas ad warrantizandum* or other process by the sheriff, the tenant may revouch, but he cannot do this on the return of *nihil* by the sheriff, suggesting the death of the vouchee (*m*), and he cannot vouch a stranger out of the blood of the first vouchee

(*a*) 2 Inst. 244.
(*b*) 2 Inst. 245. See more as to the counterpleas given by this statute. Vin. Ab. Voucher, (Q. a). And Com. Dig. Voucher, (B. 2).
(*c*) 2 Rol. Ab. 763, l. 31. 2 Inst. 245.
(*d*) 2 Rol. Ab. 763, l. 32.
(*e*) 2 Rol. Ab. 763, l. 36. Chudleigh's case, 1 Rep. 122, b.
(*f*) 2 Rol. Ab. 763, l. 44.
(*g*) 2 Rol. Ab. 764, l. 50. Vin. Ab. Voucher (Y. a). Booth, 49.
(*h*) 2 Rol. Ab. 764, l. 47, and see *ante*, p. 262.
(*i*) 2 Rol. Ab. 765, l. 5.
(*k*) Br. Ab. Counterplea *de vouch.* 20.
(*l*) 2 Rol. Ab. 765, l. 10.
(*m*) 2 Rol. Ab. 765, l. 47, 50. Vin. Ab. Voucher, (Z. a). Com. Dig. Voucher, (C). Booth, 49.

Abatement of voucher and re-voucher.

without shewing cause. (*a*) If two are vouched, and one is returned dead, the tenant may revouch at large, for perhaps his former voucher was bad (*b*), but if the tenant vouches one, and the vouchee enters into the warranty and afterwards dies, the tenant cannot afterwards vouch at large, because by the entry into the warranty, the court is apprised that the voucher is good. (*c*) If the tenant vouches, shewing cause, and the cause is traversed, he may vouch again immediately. (*d*)

Process against the vouchee.

The vouchee may, if he pleases, appear gratis, and enter immediately into the warranty; but if he refuses to do so, process then issues to bring him in. The first process is a ***summoneas ad warrantizandum,*** and if upon this writ the sheriff returns the vouchee summoned, and the latter makes default, a ***grand cape ad valentiam*** issues, and if he again makes default, judgment is given against the tenant, and for him to recover over in value against the vouchee. By the ***grand cape ad valentiam,*** it appears that the vouchee has assets, and his making default after summons is an implied confession of the warranty. If the vouchee appears, and afterwards makes default, a ***petit cape ad valentiam*** issues, and if upon the return of that writ, he again makes default, judgment is given as above. (*e*) On the return of the ***grand cape ad valentiam,*** the vouchee need not save his default, but may appear, and enter into the warranty. (*f*)

If the sheriff return ***nihil*** upon the ***summoneas ad warrantizandum,*** then after an ***alias*** and ***pluries,*** a ***sequatur sub suo periculo*** is awarded; it is so called because the tenant shall lose his lands without any recovery in value, unless upon that writ he can bring the vouchee into court. If upon the ***sequatur sub suo periculo,*** the sheriff return ***nihil,*** the demandant is entitled to judgment against the tenant; but the latter cannot have judgment to recover over in value against the vouchee, for he was never warned. (*g*) It seems, that if the vouchee is returned summoned on the ***sequatur*** or other writ, and makes default, the tenant may have judgment to recover over in value. (*h*) If the tenant has judgment to recover in value, he shall never after-

(*a*) 2 Rol. Ab. 766, l. 21.
(*b*) 2 Rol. Ab. 766, l. 24.
(*c*) 2 Rol. Ab. 766, l. 26. Br. Ab. Voucher, 107.
(*d*) 2 Rol. Ab. 766, l. 9.
(*e*) Co. Litt. 101, b. Com. Dig. Voucher, (D). Booth, 48. Br. Ab. Voucher, 140. Vin. Ab. Voucher, (H. c).
(*f*) Br. Ab. Ley Gager, 27.
(*g*) Co. Litt. 101, b. Br. Ab *Sequatur, s. s. p.* 4.
(*h*) Br. Ab. *Seq. s. s. periculo,* 4. Br. Ab. Voucher, 86.

wards have a *warrantia chartæ*, or vouch again, for by the judgment, he has got the benefit of the warranty. (*a*) There must be nine returns between the teste and the return of the *summoneas ad warrantizandum*. (*b*) Upon the return of it, the vouchee may be essoigned. (*c*) Process against the vouchee.

If the vouchee be an infant, the parol may demur till his full age. (*d*) If the tenant allege him to be an infant, which the demandant denies, a writ of *summoneas ad visum* issues, to which if *nihil* be returned, and the vouchee do not appear, an *alias*, *pluries*, and *sequatur sub suo periculo* follow, and if the vouchee still neglect to appear, there shall be judgment for the demandant; should the vouchee appear, and be adjudged upon view to be of full age, a *summoneas ad warrantizandum* goes against him, followed by the usual process. (*e*) Infant.

At common law, when the tenant in a real action brought in London, or other particular jurisdiction, vouched, and prayed that the vouchee might be summoned in a county out of the jurisdiction, great delay was occasioned by this foreign voucher; to remedy which it was enacted, by the statute of Gloucester, 6 Ed. 1, c. 12, that the tenant may have a summons out of Chancery, to summon the vouchee to appear in the Common Pleas, and a *recordari* to remove the record into the same court, and that when the warranty is determined there, the record shall be remitted to the inferior court; and if the demandant recover, the tenant shall have a writ out of the Common Pleas, to extend and value the land, and execution into the foreign county to recover in value. By stat. 9 Ed. 2, the inferior court shall adjourn the parties before the justices of the Common Pleas, at a certain day, and the *summoneas ad auxiliandum* shall issue out of that court, and not out of Chancery; and if the tenant make default at the day given in bank, a *petit cape* shall be awarded to the inferior court, to give judgment upon the default. The statute of Gloucester, though it only names London, extends to other privileged places, as Chester, Durham, Salop, &c. If the vouchee Foreign vouchee.

(*a*) Co. Litt. 102, a.

(*b*) 2 Inst. 240, abridged to four in common recoveries by 24 G. 2. c. 48. s. 2.

(*c*) *Vide ante*, p. 159.

(*d*) 2 Inst. 245.

(*e*) Br. Ab. *Sequatur*, *s. s. p.* 3. Com. Dig. Voucher, (D. 2). Br. Ab. Garranties, 14. Fitz. Ab. Voucher, 73; and see Vin. Ab. Voucher, (H. c). pl. 11. Sym's case, 8 Rep. 52, a.

Process against the vouchee.

vouches over in bank, the justices of C. P. may award process against the vouchees, *toties quoties*; the tenant may be essoigned in bank, and the demandant if he make default, nonsuited. If the husband and wife vouch, and the husband make default, the wife may be received in C. P.; but none can plead in chief, except in the inferior court. (*a*) Foreign vouchers in Wales are regulated by the statute 34 and 35 H. 8, c. 26, s. 88.

By what warranty, the vouchee after entry may be bound.

If a man has been vouched generally, when he comes in, he may be bound to warranty, either by his own deed (*b*), or by the deed of his ancestor (*c*), and if he vouched as son and heir of A., yet he may be bound by his own deed (*d*), or by the warranty of another ancestor than A. (*e*) If an infant be vouched as heir to J. S., and it is prayed that the parol demur, the vouchee cannot be bound by his own deed, though he may by the deed of another ancestor than J. S. (*f*) When the tenant vouches and shews cause, he cannot bind the vouchee for any other cause. (*g*) If two are vouched, and one shews that he was within age at the time of the warranty being made, yet the other may be bound to the warranty alone, for each binds himself to warrant the whole. (*h*)

Proceedings after voucher.

When the vouchee enters into the warranty, he stands in the place of the tenant, and the demandant counts against him, *de novo*, as against the tenant. (*i*) To this declaration the vouchee may plead in abatement, as that the demandant is outlawed, &c. (*k*), or he may plead in bar any pleas which were in *esse*, and which the tenant might have pleaded at the time of the voucher. (*l*) He may likewise plead some pleas, which the tenant himself could not have taken advantage of, as when a *præcipe quod reddat* is brought against A., who vouches B., who enters into the warranty, and afterwards the demandant releases all his right to A., the latter cannot plead this release, for the continuance in court is now between the demandant and the vouchee; but when the demandant counts against the vouchee,

(*a*) 2 Inst. 326.
(*b*) 2 Rol. Ab. 768, l. 3. Vin. Ab. Voucher, (E. b).
(*c*) 2 Rol. Ab. 768, l. 5.
(*d*) 2 Rol. Ab. 767, l. 39.
(*e*) *Ibid.* l. 55.
(*f*) *Ibid.* l. 50. *Ante*, p. 265.
(*g*) 2 Rol. Ab. 768, l. 8.
(*h*) 2 Rol. Ab. 768, l. 20. Vin. Ab. Voucher, (E. b).
(*i*) Com. Dig. Voucher, (E). Booth, 46.
(*k*) Com. Dig. Voucher, (F. 1). Thel. Dig. l. 13, c. 10.
(*l*) Com. Dig. Voucher, (F 2). Booth, 47.

Proceedings after voucher.

the latter may plead this release, or may plead a release to himself, made after he entered into the warranty, for he is now tenant in law of the land. (*a*)

The tenant also may plead certain pleas in abatement after voucher. (*b*)

Judgment upon voucher.

If the demandant counterpleads the voucher according to the statute, and the issue is found for him, it is peremptory upon the tenant, and the demandant shall recover the land. (*c*) Judgment for the tenant is that the voucher stand. (*d*)

Upon issue on counterplea to the voucher.

On demurrer to counterplea.

If, instead of taking issue on the counterplea, the tenant demurs to it, and it is adjourned to another term, and the counterplea adjudged, the judgment against the tenant is peremptory as it is said, on account of the delay, in the same manner as if issue had been taken, and a trial had, and the demandant shall recover the land. (*e*) If the counterplea is adjudged good, the same term, the tenant may plead over, for this judgment is not peremptory (*f*); but it is said that he cannot vouch again. (*g*)

On demurrer to voucher.

If the tenant vouches, and the demandant instead of counterpleading, demurs to the voucher, the judgment against the tenant is peremptory, for the voucher is given in lieu of an answer. (*h*) So it is peremptory, if the demandant demurs, because the tenant has not shewn cause of voucher, when he ought so to have done. (*i*)

On issue between the tenant and vouchee.

At common law, if the tenant vouched, and the vouchee counterpleaded the warranty, and issue was taken and found for the tenant, the judgment was only that the vouchee should warrant (*k*); but by statute Westminster 2, c. 6, the judgment in such case is made peremptory, that the demandant recover against the tenant, and the tenant against the vouchee. (*l*)

On demurrer between the tenant and vouchee.

So if the vouchee enters into the warranty, and demands of the tenant what he has to bind him to warranty, and the tenant shews special matter, upon which the vouchee demurs, it is within the statute of Westminster 2, c. 6, and the judgment is peremptory. (*m*)

(*a*) Jenk. Cent. 100, Booth, 47.
(*b*) Thel. Dig. l. 14, c. 7. Com. Dig. Abatement, (I. 28).
(*c*) Br. Ab. Voucher, 102, but see 2 Rol. Ab. 769, l. 33; and *quære*.
(*d*) 2 Rol. Ab. 770, l. 3.
(*e*) 2 Inst. 243. 2 Rol. Ab. 769, l. 36, but see Jenk. Cent. 306.
(*f*) 2 Inst. 243. Br. Ab. Peremp. 82.
(*g*) 2 Inst. 243.
(*h*) 2 Rol. Ab. 769, l. 46.
(*i*) *Ibid.* l. 50.
(*k*) 2 Rol. Ab. 770, l. 8.
(*l*) *Ibid.* l. 14. 2 Inst. 366.
(*m*) 2 Inst. 366, but see 2 Rol. Ab. 770, l. 16.

Judgment upon voucher.

In dower.

If the tenant in a writ of dower vouches the heir of the demandant's late husband in the same county, who enters into the warranty, the demandant may, as it seems, suggest that the heir has assets by descent in the same county, and pray a conditional judgment against him, if he has such assets, and if not, against the tenant. (*a*) So if the heir enters into the warranty, and pleads that he has no assets by descent, upon which issue is joined, the demandant is, as it seems, entitled to the same conditional judgment (*b*); but she must, it is said, wait until the issue is tried before she can have her dower. (*c*) If the issue is found for the tenant, she may then have execution against the heir; if found for the heir, against the tenant. If the heir, who is vouched, has no assets in the county in which the action is brought, the demandant can only have judgment against the tenant. (*c*)

Recovery in value.

Whenever a man has bound himself to warrant lands, he may be compelled to render to the party, to whom he has warranted them, a recompence in value, or, as it has been expressed, warranty implies in itself recovery in value (*d*); and in a real action in which damages are recoverable, they also shall be recovered from the vouchee. (*e*) It has been said, that in certain cases an implied warranty is created by tenure and rent. On this account the tenant for life, rendering rent, may vouch the reversioner of whom he holds, and recover in value against him. But if he vouches the remainderman, he cannot recover in value, for he does not hold of him, and it is not reasonable that the latter should render in value to one, who performs no services to him, nor can the tenant by the courtesy recover in value, for he does not hold of the heir, but of the lord paramount. (*f*) It seems, however, that in the two latter cases, though there can be no recovery in value, voucher will lie in lieu of aid-prayer. (*g*) Execution cannot be sued by him, who

(*a*) Bedingfield's case, 9 Rep. 17, b. Hale's note to Co. Litt. 39, a. (6). Vin. Ab. Voucher, (B. a). (H. b). (Q. b).

(*b*) Gray v. Williams, Dyer, 202, b.

(*c*) Jenk. Cent. 176. or the demandant may, as it seems, have an unconditional judgment against the tenant, with a *cesset executio*, till the trial of the issue. Goldingham v. Saunds, Winch, 81, 88. Hutt. 71. Cro. Jac. 688, S. C. And see Park on Dower, 298.

(*d*) Br. Ab. Garranty, 17. Vin. Ab. Voucher, (L. b). &c.

(*e*) Br. Ab. Damages, 45.

(*f*) Br. Ab. Recoverie, 14, and see Watk. on Desc. 4, note, (*m*).

(*g*) Br. Ab. Voucher, 89. Recoverie, 14.

vouches, against the vouchee, before execution is sued against himself. (*a*)

Recovery in value.

If two are vouched as heir, and one has lands by descent in possession, and the other has nothing, the tenant shall recover all against him, who has by descent (*b*); and if two coparceners are vouched, and the one makes default after default, by which the demandant has judgment against the tenant for a moiety, and the tenant over against her who made default, if the other coparcener afterwards loses, and has no assets, the tenant shall recover in value against her, who first made default, so that the first judgment shall charge her. (*c*)

Against one when two are vouched.

It is a general rule, that when the process against the vouchee has not been served, the tenant cannot recover in value against him, because never having been summoned, it does not appear that he has any assets; but if any one writ in the process to bring him in has been served, and he has made default, the tenant may then recover in value. (*d*)

When the process served, and when not.

The tenant is only entitled to have execution of the land, which the vouchee had at the time of the voucher, and therefore it may be expedient to bring a writ of *warrantia chartæ* which will bind the vouchee, in case he shall afterwards alien the lands. (*e*)

What shall be recovered.

The heir is only bound to render a recompence in value to the amount of the lands descended to him from the ancestor, who made the warranty. Therefore, where the father makes a warranty and dies, and the grandfather dies, seised of other lands in fee, the son is immediate heir to the grandfather, and shall not be bound by the warranty of the father, to render these lands in value, of which the father was never seised. (*f*) Where the warranty arises upon an exchange, no other lands can be recovered in value, but those which were given in exchange. (*g*)

If a warranty be made to tenant for life, to him and his heirs, yet he shall recover in value an estate for life only, for the warranty cannot enlarge the estate, and the recovery ought to be according to the estate. (*h*) So if the warranty had been to him and his heirs for his life (*i*), but if a man is seised in fee, and

(*a*) Co. Litt. 376, b.
(*b*) 2 Rol. Ab. 770, l. 38. Vin. Ab. Voucher, (L. b).
(*c*) 2 Rol. Ab. 770, l. 40.
(*d*) Br. Ab. *Sequatur s. s. p.* 3. Recovery, 40, 56. *Ante*, p. 268.
(*e*) F. N. B. 134, K. 2 Rol. Ab. 772, l. 3. *Ante*, p. 143.
(*f*) Br. Ab. Assets, 19.
(*g*) Bustard's case, 4 Rep. 121, a. Shep. Touch. 291. *Ante*, p. 259.
(*h*) Br. Ab. Recovery in value, 9. 2 Rol. Ab. 771, l. 29. Hob. 26.
(*i*) 2 Rol. Ab. 771, l. 33.

Recovery in value.

a warranty is made to him and his heirs *for his life*, he shall recover in value upon this warranty, an estate in fee, for an estate in fee is warranted to him, during his life. (*a*) If tenant in tail is vouched to warranty, upon his own warranty in fee, and a recovery is had against him, then if he has no other land, the land in tail shall be recovered against him in value, but this shall not, as it seems, bind the issue (*b*); but if the tenant in tail have judgment to recover over in value, the issue shall be bound. (*c*) If tenant in tail has judgment to recover in value, he shall only recover an estate tail. (*d*) If tenant in dower is impleaded by one having title paramount, and vouches the heir, she shall recover from him in value a third part only of the land remaining to the heir. (*e*) A recovery in value by a warranty on the part of the mother, shall go to the maternal heir (*f*), and when the heir at common law, and the special heir are vouched together (*g*), it seems that the recompence ensues the loss, and goes entirely to the special heir. (*h*)

The tenant shall recover in value, according to the value of the land at the time of the warranty made, and if it be of greater value than it was at that time, as by the discovery of a mine, the vouchee shall only render according to its value at the time of the warranty, though, if he enter into the warranty generally, and neglect to plead this matter specially, the tenant shall recover according to the value at the time of the entry into the warranty (*i*); but if the land warranted, becomes of greater value after the entry into the warranty, the vouchee shall render in value, only according to the value at the time of the warranty made, because he could not plead the special matter. (*k*)

The doctrine of recovery in value is highly important, from its being the foundation of the system of barring estates tail by common recovery. (*l*) The reason why common recoveries are always suffered on a writ of entry in the post, is because the tenant in that writ may vouch at large, and is not bound to vouch within the degrees, as in other writs of entry. (*m*)

(*a*) *Ibid.* l. 36.
(*b*) *Ibid.* l. 40.
(*c*) M. Portington's case, 10 Rep. 37, b.
(*d*) 2 Plow. Com. 515.
(*e*) Bustard's case, 4 Rep. 122, a.
(*f*) Co. Litt. 376, b.
(*g*) See *ante*, p. 261.
(*h*) Co. Litt. 376, b. Game v. Sims, Cro. Jac. 218. Robins. Gavel. 130.
(*i*) 2 Rol. Ab. 772, l. 41, 43, 46. Roll v. Osborn, Hob. 26.
(*k*) 2 Rol. Ab. 773, l. 32.
(*l*) See Pigott on Recov. 11. Cruise Rec. 93. Br. Ab. Recovery, 19. Hudson v. Benson, 2 Lev. 30. Martin v. Strachan, 1 Wils. 7[illegible].
(*m*) *Ante*, p. 263, note (*e*). Cruise on Rec. 15.

Of Aid-prayer.

In general.

THE doctrine of aid-prayer arises out of the solicitude displayed by the law, that every individual should have an opportunity of defending his rights, whenever they are drawn in question. Thus if a real action is brought against the tenant for life of lands, and the demandant succeeds, he will by the judgment recover the whole inheritance, and the reversioner will be consequently dispossessed of his estate. In order to prevent this grievance, and to exempt the particular tenant from the burthen of alone defending a suit in the result of which he is only partially interested, the law has given him the power of praying aid of the reversioner to plead for him, and to defend the inheritance; and where he possesses a warranty of the land, has permitted him either to vouch the reversioner to warranty, or to pray him in aid. (*a*)

In earlier times, when much land was held under the crown, aid-prayer of the king was a very important branch of learning. As the king could not be vouched, the tenant was driven in all cases where voucher would have lain against a subject, to pray him in aid; and he might thus entitle himself to a recovery in value by petition. Aid of the king was therefore of two kinds; either upon a warranty, and for the purpose of a recovery in value, corresponding with voucher; or founded on the feebleness of the tenant's estate, when it was properly aid-prayer. Hence arose a material difference between the practice of praying aid of a common person, and of the king. (*b*)

(*a*) The authorities differ as to this right of election. See Br. Voucher, 73. 1 Rol. Ab. 165, l. 45. 2 Vin. Ab. 207, (F).

(*b*) 3 Reeves' Hist. 445. As aid-prayer of the king is now so entirely obsolete, it has been thought sufficient to give the following references to the law upon the subject. Br. Ab. Aid del Roy. Fitz. Ab. Aid de Roy. 1 Rol. Ab. 148. 2 Vin. Ab. 165. Com. Dig. Aide, (B). 2 Inst. 269, 270. Aid was formerly granted in personal actions after issue joined. See 3 Reeves' Hist. 445.

Who may pray aid.

Tenant for life, in dower, and by the curtesy may pray aid. (*a*) Tenant in tail cannot pray in aid, for he himself has an inheritance. (*b*) Nor can tenant in tail, after possibility of issue extinct, on account of his having once had the inheritance. (*c*)

Coparceners.

Coparceners, before partition, cannot have aid of one another. (*d*) The ground upon which one parcener may pray in aid another parcener, is, either (*e*) the implied warranty which arises on partition between them, or the necessity of the other coparcener joining with her in deraigning, or taking advantage of a warranty paramount; for it is to be observed, that coparceners cannot sever in vouching. (*f*) Before partition neither ground exists, for there is no implied warranty; and as to deraigning a warranty paramount, the demandant ought to have sued all the coparceners, in which case, they would all have been compelled to vouch; and if the demandant has sued one only, the tenant is not allowed to pray in aid the other; because by plea in abatement he can compel the demandant to join the rest. But after partition one coparcener shall have aid of another (*g*): because now they hold as tenants in common, and are liable to be sued separately; and he shall either recover against the other, *pro ratâ*, upon the implied warranty, or both shall join in deraigning a warranty paramount. (*h*) And if a coparcener aliens with warranty, and the feoffee vouches the feoffor, the latter may pray in aid the other coparcener; but only, as it seems, for the purpose of compelling him to join in taking advantage of a warranty paramount, and not for the purpose of recovering against him *pro ratâ*. (*i*)

Jointenants.

The general rule is, that tenants, who have the fee, cannot pray in aid; and to this rule the foregoing case of a parcener who prays in aid, in order to recover *pro ratâ*, or to take the benefit of the warranty paramount, is an exception. (*k*) But if there are two jointenants in fee, and one is impleaded, he cannot have aid of his cotenant, because one has as high an estate

(*a*) 1 Rol. Ab. 168, l. 40, 167, l. 53. Roll v. Osborn, Hob. 21.

(*b*) 1 Rol. Ab. 167, l. 16.

(*c*) *Ibid.* l. 19. Co. Litt. 27, b. But reversioner may be received on his default. *Vide* in "Receit," *post*.

(*d*) 1 Rol. Ab. 182, l. 32, 184 (E).

(*e*) 1 Rol. Ab. 184 (D).

(*f*) *Vide ante*, p. 261.

(*g*) 1 Rol. Ab. 182, l. 35.

(*h*) Robins. Gavel. 131.

(*i*) 1 Rol. Ab. 183, l. 40. Co. Litt. 174, a. But see Roll v. Osborn, Hob. 26, *contra*, as to recovering in value. See also 1 Prest. Abst. 303.

(*k*) Br. Ab. Aid, 7.

as the other, and has power to plead any plea in discharge of the land, as well as the other. (*a*) By 31 Hen. 8, c. 1, s. 3, (by which statute jointenants, and tenants in common, may be compelled to make partition,) it is enacted, that each jointenant, and tenant in common, after such partition made, and their heirs, may have aid of the others and their heirs, to the intent to deraign the warranty paramount, and to recover *pro ratâ*, as is usual between coparceners, after partition made by the order of the common law. (*b*)

Who may pray aid.

A spiritual person, who has not the inheritance of land in him may pray in aid. Thus a parson who has not the mere right, and cannot maintain a writ of right, shall have aid of the patron and ordinary. (*c*) So also shall a prebendary. (*d*) And the rule seems to be, that all those who have power to charge the church may be prayed in aid. (*e*) A bishop, though he may maintain a writ of right, may, it seems, have aid of the dean and chapter. (*f*)

Spiritual persons.

A man cannot have aid of himself. (*g*) The reversioner, or remainderman, who has an estate in tail, or in fee, may be prayed in aid. (*h*) But where B. was tenant for life, remainder to C. for life, reversion to A., and B. prayed C. in aid, without praying it of A., three justices against Warburton held, that B. should not have aid of C., because B. has as high an estate as C., and may plead all that C. can. (*i*) Where there are several remainders, the lessee must pray aid of them all. (*k*)

Who may be prayed in aid.

In general, a tenant cannot have aid of the demandant. (*l*)

The death of one of two tenants in common, prayed in aid, being returned by the sheriff on the *summoneas ad auxiliandum*, will abate the aid; but not so the death of one of two jointenants. (*m*) And if the lessee has aid of the reversioner, and afterwards the latter dies, the lessee may have aid of his heir. (*n*)

(*a*) 1 Rol. Ab. 167, l. 5. Vin. Ab. Aid of a common person, (I).

(*b*) Morrice's case, 6 Rep. 12, b.

(*c*) 1 Rol. Ab. 175, l. 37. Dyer, 239, b.

(*d*) 1 Rol. Ab. 175, l. 39.

(*e*) 1 Rol. Ab. 180, l. 12.

(*f*) Fitz. Ab. Aid, 167. 1 Rol. Ab. 176, l. 26, 40. See more of Aid by spiritual persons. 2 Vin. Ab. 222, 229.

(*g*) 1 Rol. Ab. 168, l. 26.

(*h*) 1 Rol. Ab. 168 (K). 174 (S). 2 Vin. Ab. 212, (K). 220 S.

(*i*) Barnes's case, Owen, 157. Fitz. Ab. Aid, 32.

(*k*) Br. Aid, 38, 134. 1 Rol. Ab. 168, l. 23. Owen, 137.

(*l*) 1 Rol. Ab. 173, l. 1. But see *ibid.* 172, l. 50. Br. Ab. Aid, 22.

(*m*) 1 Rol. Ab. 175 (T). Thel. Dig. l. 12. c. 5.

(*n*) 1 Rol. Ab. 188, l. 30.

Who may be prayed in aid.

The tenant may pray in aid, contrary to the supposal of the writ. Therefore in a writ of entry in the degrees, the tenant may pray in aid a stranger out of the line; that is, who is not named in the writ. (*a*) Thus in a writ of entry, *sur disseisin* in the *per*, where the entry of the tenant is supposed to be by B., the tenant may say, that R. leased to him for life, and pray aid of him. (*b*) But, in this case, the aid is said to be granted by the court *ex officio;* for should the demandant grant it, it would abate his writ. (*c*)

In what action aid lies.

In general, aid may be prayed in all actions where the title to the inheritance comes in question (*d*), and it may be prayed in actions in which no land is demanded; as in partition against tenant by the curtesy; because the land is bound by the partition. (*e*) In assise, aid does not lie, unless of a party to the writ, or of the king. (*f*) But it lies in a writ of entry in the nature of an assise. (*g*) In a writ of intrusion, no aid lies; because the tenant is in of his own wrong. (*h*) Nor in a *quare impedit*, or *darrein presentment*. (*i*) In a writ of error, brought against the tenant in dower, of him who recovered, she may have aid of the reversioner. (*k*) And in a writ, in which a rent only is demanded, the defendant may pray in aid. (*l*)

At what time aid should be prayed.

Aid-prayer is a dilatory plea, and cannot, therefore, be pleaded after a general imparlance. And it is within the statute 4 Anne, c. 16, and must be verified by affidavit. (*m*) After a plea in abatement, and a respondeat ouster awarded, the tenant cannot have aid upon his plea in bar. (*n*)

Counterplea of aid.

When the tenant prays in aid, the demandant may counterplead the aid-prayer (*o*), as in receit and voucher; and the cause of the aid may be traversed, as if the tenant pleads, that J. leased to him: it is a good counterplea to say, that J. did not

(*a*) 1 Rol. Ab. 164, l. 53. This seems to give aid-prayer an advantage over voucher, in a writ of entry in the degrees.

(*b*) 1 Rol. Ab. 164, l. 32. But see Fitz. Ab. Aide, 31.

(*c*) 1 Rol. Ab. 165, l. 1.

(*d*) Com. Dig. Aide, (B. 5).

(*e*) Br. Aid, 140. 1 Rol. Ab. 169, l. 16. But see 162, l. 45. Allnatt on Partition, 66.

(*f*) 1 Rol. Ab. 161, l. 45, 163, l. 54. 2 Inst. 411. Jehu Webb's case, 8 Rep. 50, a.

(*g*) Br. Ab. Aid, 123.

(*h*) 1 Rol. Ab. 162, l. 10.

(*i*) 1 Rol. Ab. 162, l. 20, 25.

(*k*) 1 Rol. Ab. 162, l. 26.

(*l*) 1 Rol. Ab. 163, l. 15.

(*m*) 1 Rol. Ab. 185 (F). Onslow v. Smith, 2 Bos. and Pul. 384.

(*n*) Com. Dig. Aide, (B. 6).

(*o*) Br. Ab. Counterplea de Aid.

lease to him. (*a*) Counterplea of aid may be either to the estate of the prayee or of the prayor. Counterplea of aid.

It is said to be a rule, that in receit, the demandant ought to counterplead the reversion; but in aid-prayer, the lease. (*b*) It appears, however, from many cases, that in *receit*, the lease may be traversed (*c*); and in aid-prayer, the reversion. Thus, nothing in the reversion, is a good counterplea (*d*); but if lessee for life prays aid of J. S. in reversion, it is not a good counterplea, that the reversion is in J. S. and a stranger, and that the tenant ought to have aid of both. (*e*) To the estate of the prayee.

It is a good counterplea to the estate of the prayor, to say, generally, that he has nothing of the lease of the reversioner; but it is not a good counterplea to say, that he had nothing of his lease the day of the writ purchased, because, though he had nothing at that time, yet, if, pending the writ, he took an estate for life, he is entitled to aid. (*f*) That the lessee has a fee, is a good counterplea; or that he was seised in fee, the day of the writ purchased; for though he had aliened, pending the writ, and repurchased, this is no cause of aid. (*g*) It is not a good counterplea, that the lessee has parted with his estate, pending the writ. (*h*) To the estate of the prayor.

If the aid prayer is on the face of the proceedings bad, the demandant may demur. (*i*) And so if it is counterpleaded, and the counterplea is not good, the tenant may demur. (*k*) Or if good in law, the demandant may take issue upon the aid-prayer. Proceedings upon aid prayer.

The judgment for the demandant, upon demurrer, either to the aid-prayer, or counterplea, is not peremptory; but only, that the tenant answer alone. (*l*) And if judgment be for the tenant, it is, that he have aid. (*m*) If the demurrer was adjourned to another term, and the judgment was given for the demandant, Demurrer or issue. Judgment on demurrer.

(*a*) 1 Rol. Ab. 189, l. 25.

(*b*) Br. *Count. de Aid*, 3, 34.

(*c*) *Vide* in "*Receit*," *post*.

(*d*) 1 Rol. Ab. 190, (L).

(*e*) 1 Rol. Ab. 190, l. 36.

(*f*) 1 Rol. Ab. 189, l. 35. Br. Aid, 69. *Count. de Aid*, 2. But see Br. Aid, 123.

(*g*) 1 Rol. Ab. 189, l. 37, 40. Br. *Count de Aid*, 4.

(*h*) 1 Rol. Ab. 190, l. 4. But *quære*, whether the prayee might not refuse to join in aid. Br. Aid. 109.

(*i*) Onslow v. Smith, 2 Bos. and Pul. 384. Co. Litt. 72, a.

(*k*) Br. Peremptorie, 11.

(*l*) 2 Bos. and Pul. 384. Jenk. Cent. 306. As to demurrer to replication to plea in abatement, see Medina v. Stoughton, 1 Ld. Raymond, 594.

(*m*) Jenk. Cent. 306, pl. 82.

Proceedings upon aid-prayer.

it appears, that the judgment ought to be peremptory, that the tenant lose his land. (*a*)

On issue joined.

The judgment for the demandant, upon issue taken on the counterplea, is peremptory, that the demandant have seisin of the land. (*b*) The judgment for the tenant, in such case, is, that he have aid. (*c*)

The demandant may, if he pleases, at once admit the aid-prayer.

Process against prayee.

The reversioner, or remainderman, may immediately join in aid, without process (*d*); but if he should refuse to do so, the tenant must sue out a writ called a *summoneas ad auxiliandum*. On the return of this writ, the prayee may essoign himself (*e*); or may appear and join in aid: if essoigned, he must appear, and join in aid on the adjournment day of the essoign. (*f*) If the prayee makes default at the *quarto die post* of the *summoneas*, or essoigns himself, and makes default at the adjournment day of the essoign, there shall be judgment for the demandant, that the tenant answer alone. (*g*)

The writ of *summoneas ad auxiliandum*, should be executed by serving it upon the prayee in aid; and, as it seems, upon the

(*a*) Br. Ab. Peremp. 10. But see Jenk. Cent. 306.

(*b*) Br. Ab. Peremptorie, 76. 2 Leon. 52. Jenk. Cent. 306.

(*c*) Alleyn, 66.

(*d*) 1 Rol. Ab. 192, l. 30.

(*e*) *Vide* in Essoign, *ante*, p. 159.

(*f*) Rast. Ent. 26, b.

(*g*) Co. Ent. 49, a. Rast. Ent. 27, a. *Resp. sans Ayd.* It is said by the court, in Onslow v. Smith, 2 Bos. and Pul, 386, 388, that the tenant cannot be adjudged to answer by himself, until the prayee has made *default after default;* and so the law is laid down by Mr. Serj. Williams, (2 Saund. 45 k, note,) that if the prayee make *two* defaults, judgment is given, &c. Booth (p. 61,) says, that, "at the return of the *summoneas*, if the prayee do not appear or essoign, and after make default, judgment is entered." Perhaps the manner in which the practice is stated by Booth, may have given rise to what appears to be a mistake in the books above cited; for, it seems, that judgment shall be given upon the *first* default of the prayee, viz. for not appearing on the return of the *summoneas;* or if essoigned at that time, for not appearing on the adjournment day of the essoign. See *Co. Ent.* 49, *a. Rast.* 27, *a. Resp. sans Ayd.* It is said, in one book, that if, on the *quarto die post* of the return of the writ, the prayee have not appeared, the tenant should sue out an alias; and if the prayee be *again* summoned on that writ, and do not appear on the *quarto die post* of it, the court then give judgment, that the tenant shall answer to the demandant without aid. *Archb. Dig. of Pl.* 412. And see Serj. Williams's note, *ut supra*. But it seems, that if the prayee has been summoned upon the *summoneas*, there is no necessity for an *alias*, nor indeed can it issue, the first writ having been fully executed; (1 *Taunt.* 55,) therefore *quære* the form of the judgment given, 2 Saund. 45 k, (note).

land in demand. (*a*) If the sheriff returns *nihil*, an *alias* may issue. Process against the prayee.

It appears to be doubtful, whether after aid-prayer the demandant should count *de novo;* or, whether the prayee shall only have oyer of the former count. (*b*)

When the prayee joins in aid, he may either vouch (*c*), or plead certain pleas in abatement (*d*), or in bar, or in a writ of right join the mise upon the mere right. (*e*)

If aid be granted where it does not lie, it is not error, but only a delay; if it be denied where it ought to be granted, it is error. (*f*)

(*a*) *Vide ante*, p. 148.
(*b*) Br. Ab. Count, 7, 87. Vin. Ab. Declaration, (K).
(*c*) *Vide ante.*
(*d*) Com. Dig. Abatem. (I. 39).
(*e*) 2 Saund. 45 k, note.
(*f*) Br. Ab. Aid, 118.

Of Default after appearance and Petit Cape.

BEFORE appearance in real actions, if the tenant make default, a writ of grand cape must issue before the demandant is entitled to judgment, but when the default is after appearance, a petit cape issues in actions where land is demanded, and a *distringas* in lieu of a petit cape in certain actions in the realty, as in a writ *de consuetudinibus et servitiis.* (*a*) A petit cape differs little from a grand cape, except that the latter issues upon a neglect to appear or cast an essoign on the return of the original, and the former on a similar neglect at the return of some subsequent process after the tenant has once appeared. In both cases, if the tenant fails to save his default at the return of the cape, the demandant is entitled to judgment of seisin. A circumstance which would have constituted a valid excuse, at the return of the grand cape, for the tenant's neglect to appear, may be alleged to save his default at the return of the petit cape, except the excuse of non summons. (*b*) The petit cape must be served fifteen days before the return day. (*c*)

Default after appearance takes place whenever the tenant, after having once appeared, is bound in some subsequent stage of the proceeding again to appear in court, as on a day given on an essoign, after an imparlance, on the return of the writ of view, on the return of the *venire facias*, or on a day given in a superior court to which the record has been removed by *certiorari.* (*d*) In some cases of default after appearance, the demandant is entitled to judgment immediately without a petit cape; in others on a default at the trial the inquest is taken by default. (*e*)

In general no inquest in a real action can be taken by default, the statute of Marlebridge, c. 13, applying only to personal actions (*f*), and therefore, where the tenant neglects to appear at

(*a*) 1 Rol. Ab. 585. (Q.) Booth, 64. Com. Dig. Pleader, (B. 11). Williams v. Gwyn, 2 Saund. 46. *Ante*, p. 165; if judgment in such case be given without a petit cape, it is error, Slaughter v. Tucker, 1 Lev. 105.

(*b*) See *ante*, in Saver Default, p. 169.
(*c*) Br. Ab. Gr. Cape, 36.
(*d*) Booth, 65.
(*e*) See *post*.
(*f*) 2 Inst. 127. Booth, 65.

the trial, the demandant cannot proceed to try the cause, but must issue a petit cape; on the return of which writ, if the tenant does not appear and save his default, the demandant is entitled to judgment of seisin; but the demandant may if he pleases waive the default at *nisi prius*, and instead of issuing a petit cape, may continue the writ with further process. (*a*) There are however some real actions in which the inquest may be taken by default, and in which therefore no petit cape or writ in nature of a petit cape is required.

Thus in an assise of novel disseisin, if the tenant makes default at the first day, the inquest shall be taken by default (*b*), and in a writ of waste if the tenant makes default at the return of the *distringas*, a writ shall issue to inquire of the waste done, by the statute of Marlebridge, c. 12. (*c*)

When an issue is found for the demandant, judgment shall be given for him without a petit cape, for after issue found nothing remains but to give judgment. (*d*) And therefore in a writ of cosinage, if bastardy is pleaded in the demandant, and the bishop returns that he is a *mulier*, if at this return the tenant makes default, the demandant shall recover without a petit cape, for the issue is found for him. (*e*) And if the defendant departs in despite of the court, judgment may be given without a petit cape. (*f*)

A departure in despite of the court, is when the tenant after appearance, and being present in court, upon demand, makes departure in despite of the court. (*g*) When the tenant once appears, as the term in contemplation of law is only one day, he is, in contemplation of law, present in court the whole term (*h*), and therefore if being demanded at any time during that term, he does not appear, it is a departure in despite of the court (*i*), and

Departure in despite of the court.

(*a*) Staple v. Heyden, 6 Mod. 4. Com. Dig. Pleader, (B. 11).

(*b*) 1 Rol. Ab. 586, l. 15.

(*c*) *Vide ante*, p. 154.

(*d*) 1 Rol. Ab. 587, l. 45. Br. Ab. Judgm. 108. Default, 45. Fitz. Ab. Judgm. 7. Booth, 65.

(*e*) 1 Rol. Ab. 587, l. 45.

(*f*) 1 Rol. Ab. 587, l. 24, and see post.

(*g*) Co. Litt. 139, a.

(*h*) Chetham v. Sleigh, Carthew, 47. Com. Dig. Pleader, (B. 11).

(*i*) Br. Depart. in despite 2, as to what shall be deemed a departure in despite, after an imparlance, (a very obscure and difficult subject), see Br. Departure in desp. 1, 2, 3, 5, 6. Beecher's case, 8 Rep. 62, a. 1 Rol. Ab. 583 (I). Herne v. Lilborne, 1 Bul. 161. Cro. Jac. 293, S. C. Yelv. 211, S. C. Chetham v. Sleigh, Carth. 46, Booth, 67. Vin. Ab. Default, (I).

judgment may be immediately signed against him without issuing a petit cape. (*a*). It would be evidently useless in this case to issue a petit cape, (which is only for the purpose of giving the tenant an opportunity of saving his default at the return of the writ,) when there is no default to be saved, for the tenant in contemplation of law was actually in court at the time when he was demanded, but contemptuously departed.

So if the tenant suffer judgment by *nihil dicit* the same term in which he appeared, this is a departure in despite of the court (*b*), and the demandant will be entitled to judgment without any petit cape. (*c*) As issuing a petit cape, where it is not required, is merely in delay of the demandant, and not prejudicial to the tenant, it cannot be assigned for error (*d*), and therefore, in all cases where it is doubtful, whether the default of the tenant amounts to a departure in despite of the court, it will perhaps be prudent not to take judgment immediately, but to issue a petit cape.

If the tenant in a writ of right makes default after the mise joined upon the mere right, judgment may be given without issuing a petit cape. (*e*)

The tenant before saving his default on the return of the petit cape, may it seems plead such pleas in abatement as shew the writ to be *abated*, but not such as merely prove it abateable. (*f*)

If on the return of the petit cape the tenant succeeds in saving his default, it seems, that, although issue has been joined, the writ shall abate (*g*); but the demandant, if he is apprehensive of the tenant being able to save his default, may release it.

(*a*) Williams v. Gwyn, 2 Saund. 46, a, and 45, note.

(*b*) Br. Ab. Default, 34.

(*c*) Williams v. Gwyn, 2 Saund. 46. 1 Ventr. 60, S. C. Com. Dig. Pleader, (2 Y. 19).

(*d*) Williams v. Gwyn, 2 Saund. 46, b.

(*e*) Herne v. Lilborne, 1 Bulstr. 161. Penryn's case, 5 Rep. 85, b, *contra*.

(*f*) Co. Litt. 303, b. *Vide ante*, p. 171.

(*g*) 13 Ed. 4, 1.

Of Receit.

In general.

DURING the earlier periods of the law it appears to have been usual for the tenants of particular estates, and husbands seised *jure uxoris*, to cause themselves to be impleaded in some real action, and then to suffer judgment by default(*a*), or to plead a false plea, by which means they were enabled to transfer the whole inheritance in the lands to a purchaser. The remedy of the reversioner, and of the wife at common law, appears only to have been by writ of right, while a remainderman, as neither he nor his ancestors had ever had seisin, was not entitled to that action, and seems to have been absolutely without redress. (*b*) At length the writ of *cui in vitâ* was given to the wife, and *sur cui in vitâ* to her heir, by which the lands aliened were recovered. (*c*) At this period it seems that the act of the particular tenant in conveying a greater estate than he was seised of, did not operate as a forfeiture, so as to entitle the reversioner or remainderman to enter; for a recovery by default was not yet regarded as a common assurance, and the law gave so much credit to such a recovery, that an entry was not allowed to him in reversion or remainder. (*d*) It appears from Bracton, that if the reversioner was aware of the writ brought against his particular tenant, he might, on the tenant neglecting to vouch him, appear unvouched, and enter into the warranty in order to defend his own right. (*e*)

Notwithstanding this, it was thought necessary to provide by the statute of Westminster 2, (13 Ed. 1, c. 3,) that if tenant by the curtesy or for life should make default or give up the land, the heirs or reversioners (and by the equity of the statute those in

(*a*) The default of the husband in a *præcipe quod reddat*, against husband and wife, is the default of both. Jenk. Cent. 27.

(*b*) Ferrar's case, 6 Rep. 8, b.

(*c*) See *ante*, p. 96.

(*d*) Litt. s. 481, the argument of Coke in Sir W. Pelham's case, 2 Leo. 62, but see what is said by Manwood, B, *ibid.* p. 64. In Sir W. Pelham's case it was held that a recovery suffered by tenant for life was a forfeiture, and the reversioner might enter, 1 Rep. 14, b. and see 5 Ass. 3.

(*e*) Bracton, 393, b. See Fairclaim, d. Fowler v. Shamtitle, 3 Burr. 1301.

In general.

remainder) should be received before judgment; and by the same statute a similar remedy was given to the wife, where the husband absented himself, or would not defend her right, or against her consent, rendered the land. A further remedy was given to the reversioner by writ of entry (*ad communem legem*) after the death of the particular tenant. (*a*)

This statute did not provide against the particular tenant losing the lands by false pleading, in consequence of which, the 13 Ric. 2, c. 17, was passed, by which the reversioner may in such case pray to be received, to defend his right at the day when the tenant pleads to the action, or before, and shall be received to plead in chief to the action. Even after these statutes a practice was devised to defraud the reversioner, for the particular tenants used to suffer recoveries secretly, so that it was impossible for the reversioners to pray to be received; to remedy this mischief, the statute of 32 H. 8, c. 31 (*b*), was made, by which all recoveries had against tenant by the curtesy or otherwise for life or lives, by agreement of the parties, of any lands of which such particular tenant is seised, are declared void against him in the reversion. Attempts being made to evade this statute by the particular tenant making a feoffment with warranty, in order that the feoffee might be impleaded, and vouch the tenant for life, which recovery would be out of the 32 Hen. 8, for it would not be had against the particular tenant (*c*), the 14 Eliz. c. 8, enacted that such recoveries had, where such particular tenants are vouched, should be void, if such recovery was of covin between them. (*d*)

The earliest statute giving receit was the statute of Gloucester, 6 Ed. 1, c. 11, relating to tenants for term of years. Before that statute the interest of a tenant for years was completely in the power of the freeholder, for if the latter chose to suffer a recovery in a real action, even though it was by collusion (such credit did the common law give to recoveries in real actions,) the interest of the termor was destroyed, because he could not falsify a recovery of the freehold, since at common law no one but the freeholder could falsify a recovery of a freehold. (*e*) The

(*a*) See *ante*, p. 93.

(*b*) Repealed by 14 Eliz. c. 8. See Co. Litt. 362, a.

(*c*) Jennings's case, 10 Rep. 45, a.

(*d*) 2 Leo. 62. Co. Litt. 362, a. A recovery where tenant for life vouches tenant in tail, who vouches the common vouchee, is not within the act. *Ib.*

(*e*) 2 Inst. 321, 322. Co. Litt. 46, a. Anon. 2 Mod. 18.

statute of Gloucester gave a two-fold remedy, first for the city of London, and other privileged places, by a writ in the nature of a commission to the mayor and bailiffs, to inquire whether the recovery was by collusion and fraud; and second, by allowing the termor in other cases to be received before judgment. In general.

By statute 21 Hen. 8, c. 15, termors may falsify, for their terms only, recoveries upon feigned and untrue titles in the same manner as a tenant of the freehold may, and notwithstanding such recoveries, they may enjoy their terms according to their leases, so that by this latter statute, the necessity of receit by tenant for years is in fact taken away. (*a*)

The statute of Westminster 2, c. 3, enacts, that the wife may be received to defend her right, which must be understood her right at the time of the *præcipe* brought, and not at the time of the receit; therefore, if after the *præcipe*, the husband and wife levy a fine, and the husband makes default after default, the wife may be received; and the statute is also to be understood of a tenancy in law as well as in deed, for if the husband and wife be vouched, the wife upon the default of her husband shall be received. But the wife is only received for the purpose of defending her own right, and she cannot therefore, as the reversioner may, after receit confess the action. (*b*) This statute does not aid the wife in case of the false pleading of the husband (*c*), and she cannot be received unless she is a party to and impleaded by the same writ as her husband (*d*); but if baron and feme, being vouched enter into the warranty and make default, the feme may be received though the writ be not brought against the baron and feme. (*e*) Receit by the wife.

The words of the statute of Westminster 2, c. 3, are that *they to whom the reversion belongs*, shall be received, but a remainderman in fee is held to be within these words (*f*), and a By reversioner.

(*a*) Sir W. Pelham's case, 2 Leon. 65, but see Williams v. Drew, 3 Leon. 168. Mic. 29 Eliz. where termor was received, and three of the judges held, that unless he prays to be received, although his term shall stand, yet he may be put out of possession and compelled to bring his action. Manwood, B. in 2 Leon. 65, says that in case of common recoveries the recoverer cannot put out the termor.

(*b*) 2 Inst. 344. 2 Rol. Ab. 438, (I). Vin. Ab. Receipt, (I).

(*c*) 2 Inst. 343, but see Fitz. Ab. Receit, 182. Greswold v. Holmes, Cro. Eliz. 826, and Com. Dig. Rec. (A. 3).

(*d*) Caine's case, Moor, 242. Key's and Sted's case, 1 Leon. 86.

(*e*) 2 Rol. Ab. 438, l. 45.

(*f*) Litt. s. 481. Co. Litt. 280, b. 2 Rol. Ab. 436, l. 29. Vin. Ab. Receipt (D). Moor, 29.

Receit by reversioner.

remainderman in tail may be received on the default of the lessee, and so of a remainder for life. (*a*) And where there is lessee for life remainder for life, reversion in fee, he in the reversion in fee may be received (*b*), but if the reversioner in fee, and remainderman for life pray to be received at the same time, the mesne estate for life, in respect of proximity, shall be preferred before the reversion in fee (*c*); and where one in remainder for life is received and makes default, another in remainder may be received, although he did not pray to be received at the day when the first remainderman was received. (*d*)

With regard to the time at which the remainder or reversion accrues to the person who prays to be received, it appears to be immaterial whether it be before or after the writ purchased (*e*), provided the reversion or remainder was in *esse* at the time of the writ brought. (*f*) It is sufficient if the person to be received had the reversion, either at the time of the writ purchased, or at the time of his praying to be received. Therefore, if the lessor pending the writ makes a new lease to the lessee and a stranger, by deed, this is a surrender of the first lease, or if pending the writ, the tenant surrenders, yet the reversioner may be received. (*g*) But if a man is seised in fee, and a writ is brought against him, and, pending the writ, he makes a feoffment in fee, and retakes an estate for term of life, there the feoffee cannot be received. (*h*)

There is, however, one exception to the rule, that a man cannot be received in respect of a reversion newly created pending the writ, and that is where a person who has nothing in the land is impleaded, and he who has the fee, after the writ purchased, makes a lease to him for life, and prays to be received, in this case, as he has made the writ good, he may be received (*i*); and so if that reversion be granted, the grantee may be received. (*k*) Where a rent is demanded against tenant for life, he in reversion, or remainder, may be received by the equity of the statute. (*l*)

(*a*) 2 Rol. Ab. 436, l. 32, 35.
(*b*) 2 Rol. Ab. 436, l. 37. Jennings's case, 10 Rep. 44, b. Br. Ab. Resceit, 18. *Contra* where the mesne remainder is in tail, *ibid.*
(*c*) 2 Inst. 346. Jennings's case, 10 Rep. 44, b.
(*d*) Br. Ab. Resceit, 63.
(*e*) Br. Ab. Resceit, 57, *per* Ascough. 60, *per* Newton. 2 Inst. 346.
(*f*) Br. Ab. Resceit, 136.
(*g*) Keilw. 70, b.
(*h*) Br. Ab. Resceit, 113.
(*i*) 2 Inst. 346. Keilw. 70, b.
(*k*) Br. Ab. Resceit, 43.
(*l*) 2 Inst. 346.

Receit by reversioner.

The reversion intended by this act must not be a condition, or possibility merely. (*a*)

The tenants upon whose default, &c. the reversioner may be received, are tenants in dower, by the curtesy, after possibility of issue extinct, or any other tenant for life, but not a tenant in tail. (*b*)

It has been already said, that the reversioner may be received on the feint pleader of the tenant, by stat. 13 R. 2, c. 17. (*c*)

Receit by termor.

Although at the time of the statute of Gloucester being passed, by which termors may be received, there was no tenancy by statute merchant, statute staple, or *elegit*, yet those tenants are held to be within the statute; but not so a guardian in chivalry, for he does not come in by the contract of the parties, but merely by the act of law. (*d*) A termor, to be received, must by the express words of the act be by deed; but under the statute 21 Hen. 8, c. 15, tenant for years without deed may falsify. (*e*) This statute extends to the default, or render, or *nient dedire* of the tenant, or of a vouchee, but not to false pleading (*f*); even though the termor be a party to the writ he may be received. (*g*)

It is enacted by the statute of Gloucester, that if the recovery be found to be upon good right, judgment shall be forthwith given; but if it be found by fraud to cause the termor to lose his term, the termor shall enjoy his term, and the execution of the judgment for the demandant shall be suspended, until the term be expired. It has been doubted in whom the reversion resides during the continuance of the term. Sir Edward Coke says, that the lessor and his heirs have the reversion, and shall have the rent, and punish waste (*h*), but according to Fitzherbert, J. the possession of the termor is the possession of the recoveror, and if the former be ousted, the latter shall have assise. (*i*) The decision of the judges in Shelley's case, confirms the opinion of Sir Edward Coke. (*k*)

(*a*) 2 Inst. 345.

(*b*) 2 Inst. 345. Linc. Coll. Case, 3 Rep. 610.

(*c*) See *ante*, p. 286. 2 Inst. 346.

(*d*) 2 Inst. 322, 3. Com. Dig. Receit, (A. 1). but see Co. Litt. 46, a. and Keilw. 109, a.

(*e*) 2 Inst. 322, 323.

(*f*) *Ibid.* 323, 324, but as to vouchee, see Br. Ab. Resceit, 67.

(*g*) Williams and Drew's case, 3 Leon. 168.

(*h*) 2 Inst. 323, and see Keilw. 108, b.

(*i*) Br. Ab. Assise, 1.

(*k*) Shelley's case, 2nd point, 1 Rep. 94, a. 106, b. Jenk. Cent. 249.

In what actions receit lies.

Receit lies in general in all real actions, in which the reversioner or remainderman, on the default, or false pleading of the particular tenant, may be put out of his reversion or remainder; or where the wife, by the default of her husband, would lose seisin of her inheritance, or where a termor would be ousted of his term. (*a*)

In the writ of waste, the same difficulty occurs with regard to receit, which has been already noticed in speaking of default in that action (*b*), viz. whether in case of a default upon the *distringas*, as a writ issues to inquire *de vasto facto*, and a verdict of twelve men passes, the plaintiff can be said to recover by default. The better opinion appears to be, that receit will lie in such a case (*c*); and it seems the wife should pray to be received before writ of inquiry awarded. (*d*)

In assise also, the same difficulty occurs, because on the default of the husband, the assise shall be taken by the recognitors; but in this case as well as in waste, the wife may be received, and the reason given is, because when the assise is taken in this manner by default, the husband and wife lose their challenges to the jury (*e*), but the wife should, it is said, pray to be received before the assise is awarded by default. (*f*) The reversioner cannot be received in assise, unless he is a party to the writ; and he also, as it is said, should pray to be received before the assise awarded by default. (*g*) The authorities on the point of receit lying after the assise taken by default, are exceedingly conflicting.

Receit also lies in a writ of mesne (*h*); for the feme in *quarē impedit* against baron and feme, for this action savours of the realty (*i*); in a writ of entry, in nature of an assise (*k*), and in a *scire facias* to have execution of damages recovered in an assise. (*l*)

At what period of the proceedings receit lies.

Many contradictory decisions and opinions occur on the question of the period at which a party can be received after default in real actions. Both in the case of a feme covert, and of a re-

(*a*) Vin. Ab. Receipt, (F.)

(*b*) Vide in *Quod ei deforceat, ante*, p. 134, and Deceit, p. 137.

(*c*) Co. Litt. 355, b. Br. Ab. Resceit, 61, 116. 2 Rol. Ab. 437, l. 5.

(*d*) Br. Ab. Resceit, 4, 26.

(*e*) Br. Ab. Resceit, 125. Gregory's case, 2 Leon. 9.

(*f*) Br. Ab. Assise, 299, Resceit, 4, 71, but see Metcalf's case, 11 Rep. 39, a.

(*g*) 2 Rol. Ab. 437, l. 26. Br. Resceit, 71, 98. But see 2 Rol. Ab. 439, l. 34. 2 Inst. 343, and 11 Rep. 39, a.

(*h*) 2 Rol. Ab. 437, l. 31.

(*i*) *Ibid.* l. 43.

(*k*) *Ibid.* l. 7.

(*l*) *Ibid.* l. 48. 2 Inst. 470, and see other actions in which Receit lies. 19 Vin. Ab. Resceipt, (F.)

versioner the receit is by the statute directed to be after default and before judgment. With regard to the first point, the authorities differ as to the necessity of the party praying to be received on the first opportunity after the default, and with regard to the latter, as to what shall be considered a judgment.

At what period of the proceedings receit lies.

Before the wife can be received for the default of her husband, there must be a default incurred, upon which the land would be lost, were not the wife received. (*a*) Thus in a *præcipe quod reddat* against husband and wife, if they make default at the summons, the wife cannot be received (*b*), because another default must be incurred, viz. at the return of the grand cape, before the demandant can have judgment of seisin, and this is the proper time for her to pray to be received on the default of her husband before appearance (*c*); and so after appearance she may be received at the return of the petit cape, and where a petit cape ought to issue, she must wait until it is returnable before she can be received. (*d*)

Receit by feme.

If baron and feme make default after default, and a stranger comes and says that the feme was tenant for life, reversion to him in fee, and prays to be received, and is received, and afterwards makes default after default, the feme cannot be received, for she then comes too late. (*e*)

He in reversion, or remainder, must, by the words of the statute of Westminster 2, pray to be received, after the default of the particular tenant, and before judgment. The regular time therefore for the reversioner to pray to be received, is on the return of the grand cape before appearance, or of the petit cape after appearance, when he prays to be received on account of the tenant's *default;* but it seems, that if the reversioner suffers two or three days to elapse, after the return of the process, yet if he comes before judgment, and before any adjournment, or act of the court, it is sufficient. (*f*)

By reversioner.

If lessee for life prays aid of him in reversion, who upon summons makes default, and afterwards the lessee makes default, the reversioner may be received notwithstanding the first delay (*g*),

(*a*) 2 Rol. Ab. 438, l. 33. Vin. Ab. Receipt, (I).

(*b*) 2 Rol. Ab. 438, l. 39.

(*c*) 2 Rol. Ab. 438, l. 41.

(*d*) *Ibid.* l. 35. Br. Resceit, 66. With regard to the time at which the wife shall be received in assise, *vide* Br. Ab. Assise, 24, 45, 48, 210. Resceit, 105. 2 Inst. 343. Metcalf's case, 11 Rep. 39, a. *Ante*, p. 290.

(*e*) 2 Rol. Ab. 446, l. 12, and see more of receipt by feme covert, 2 Rol. Ab. 440. Vin. Ab. Resceipt, (L).

(*f*) 2 Rol. Ab. 439, l. 46. Br. Ab. Resceit, 46.

(*g*) 2 Rol. Ab. 438, l. 52.

At what period of the proceedings receit lies.

and so after aid granted, and joinder and pleading of him in reversion, if the tenant makes default (*a*); and where the reversioner, upon aid-prayer, joined and pleaded, and afterwards made default himself, and then came and prayed to be received, it was granted, though upon his own default. (*b*) So if the reversioner is vouched, and makes default upon the *summoneas ad warrantizandum*, and the lessee also makes default at the return of the grand cape *ad valentiam*, if the lessee again makes default at the return of the petit cape, the reversioner may be received notwithstanding his prior default (*c*); and after default by baron and feme, and receit of the feme, and default by her, another person may come and say, that the feme has nothing in reversion, but only for term of life, the reversion to him, and may pray to be received. (*d*)

In a *præcipe quod reddat* against tenant for life, in which issue is joined, if the tenant makes default at *nisi prius*, the reversioner may be received at the day in bank, although he do not proffer himself at *nisi prius*, because a petit cape is to be awarded. (*e*) But, though the judge at *nisi prius* has no power to allow the receit, yet it is said to be the safest way to pray it there. (*f*) And in a writ of waste it seems that the reversioner should pray to be received at *nisi prius* upon a default there. (*g*)

When the reversioner prays to be received for the false pleading of the tenant, the words of the statute are, that when he prays to be received to defend his right, *at the day that the tenant pleads to the action, or before*, he shall be received. The reversioner therefore cannot in such case pray to be received, after the time, when the tenant ought to have pleaded. (*h*)

Shewing cause of receit.

When a party prays to be received, it should appear to the court, that he has a right to such indulgence, and therefore in some cases it is necessary that he should shew cause, that is, set out a title in himself, and shew his connexion with the premises in dispute. When a feme covert prays to be received for the default of her husband, she is a party to the action, and the

(*a*) *Ibid.* 439, l. 9.

(*b*) Br. Ab. Default, 101, but if tenant for life pray aid of him in reversion, who refuses to join, he cannot afterwards be received, 2 Inst. 345.

(*c*) 2 Rol. Ab. 439, l. 3.

(*d*) Br. Ab. Resceit, 39.

(*e*) 2 Rol. Ab. 439, l. 22; but *quære* whether he can be received before the return of the petit cape, *Ibid.* 438, l. 35. *Ante*, p. 291. Moor, 29.

(*f*) 2 Inst. 343.

(*g*) 2 Rol. Ab. 439, l. 33. *Ante*, p. 290.

(*h*) Br. Ab. Resceit, 98. Per Brooke.

demandant has acknowledged her to be tenant of the land, by bringing a *præcipe* against her. It is therefore unnecessary for her to shew cause of receit. (*a*) But where a reversioner prays to be received, as he is a mere stranger to the action, he must shew in what manner he claims the reversion (*b*), and so when a termor prays to be received, he must set out his title to the term. (*c*) It is likewise necessary for the termor to allege collusion between the demandant and the tenant (*d*); but this allegation appears not to be traversable. (*e*) It is not sufficient for the termor merely to allege collusion, for he must at the same time plead some plea to bar the demandant's title, or, as it is expressed, he must traverse the point of the writ. (*f*)

Shewing cause of receit.

Whenever a person prays to be received, who ought not to be received, the demandant may counterplead the receit. The most usual counterplea is that the reversioner or remainderman had nothing in the reversion or remainder, at the day of the writ purchased, or after. (*g*) So nothing in the reversion generally is a good counterplea, but nothing in the reversion at the day of the writ purchased is not sufficient, because, as we have seen, a man may be received on a reversion conveyed to him, *pendente brevi*. (*h*) It is said to be a good counterplea, that he who prays to be received has granted the reversion over to another, pending the writ (*i*), the reason seems to be because the grantee of the reversion might pray to be received. If a man prays to be received on account of a remainder limited to him, it is a good counterplea to say that the remainder was limited to him and his wife. (*k*) It seems doubtful whether the demandant can counterplead the lease or only the reversion, though upon principle it should seem that he may counterplead either. (*l*) The demandant may confess, and avoid the prayer of receit; thus he may say that before the lease, the prayor disseised the demandant, and after leased to the tenant upon

Counterplea of receit.

(*a*) 2 Inst. 345. See entry of receit of wife on default of husband at *nisi prius*, Rast. Ent. 581, b. Co. Ent. 173, a.

(*b*) 2 Inst. 345. See entry of receit of reversioner on feint pleader of the tenant. Rast. Ent. 581, a. and more as to shewing cause of receit. Vin. Ab. Receipt, (R. 2).

(*c*) Co. Ent. 173, b.

(*d*) Co. Ent. 175, b.

(*e*) Williams and Drew's case, 3 Leon. 168. Com. Dig. Receipt, (A 1).

(*f*) Br. Collusion, 21. 2 Inst. 323-4.

(*g*) 2 Rol. Ab. 443, l. 46. Br. Counterplea de Rec. 12.

(*h*) 2 Rol. Ab. *ut sup.* *Ante*, p. 288.

(*i*) 2 Rol. Ab. 443, l. 54.

(*k*) 2 Rol. Ab. 444, l. 13.

(*l*) 2 Rol. Ab. 444, l. 3. Br. Count. de Rec. 1, but see *Ibid.* 3. Fitz. Ab. Resc. 80. See in aid-prayer, *ante*, p. 279.

Counterplea of receit.

whom the demandant entered, and that the tenant re-entered, for this shews the lease destroyed. (*a*)

It is a good counterplea, that the tenant, who is supposed to be a lessee, is seised in fee (*b*), or in tail, or was so seised at the day of the writ purchased. (*c*)

The prayor may take issue upon the counterplea (*d*), or if it be not good may demur. (*e*)

If the demandant pleases, he may immediately admit the prayor gratis, and count against him. (*f*)

Sureties for the mesne profits.

In consequence of the great delays which were occasioned to demandants, by persons who had no interest in the lands, praying to be received, by collusion with the tenant, in order to defer judgment, it was enacted by 20 Ed. 1, stat. 3, that where any one before judgment comes in by a collateral title, and prays to be received, before his receit, he shall find sufficient surety as the court shall award, to satisfy the demandant of issues of the lands so to be recovered from that day, that he is received to make answer, until the time that final judgment be given upon the petition of the demandant. (*g*)

Where a writ is brought against baron and feme, and the feme prays to be received, she need not find surety by the statute. (*h*) It has been doubted, whether, if the receit is granted gratis, it is necessary for the reversioner to find sureties, but the better opinion is said to be that it is. (*i*)

Count *de novo*.

There are many contradictory authorities as to the necessity of the demandant counting *de novo* against the tenant by receit. With regard to a feme covert, it seems to be unnecessary to count *de novo* against her, for she is a party to the writ (*k*), though the contrary is laid down by Sir Edward Coke. (*l*) The ground of the opinion, that the wife must plead immediately, is the wording of the statute of Westminster 2, which says that she must come *parata petenti respondere*, and therefore that

(*a*) 2 Rol. Ab. 444, l. 9. Br. Ab. Count. de Res. 8.

(*b*) 2 Rol. Ab. 444, l. 20, but see a *quære* in Br. Ab. Count. de Res. 6.

(*c*) 2 Rol. Ab. *ubi sup.*

(*d*) Br. Ab. Resceit, 115. Cro. Jac. 242.

(*e*) Co. Ent. 333, b.

(*f*) Herne's Pl. 409, (paged 509).

(*g*) See the form of the entry of surety given. Rast. Ent. 581, b. Herne's Pl. 509, b.

(*h*) Fitz. Resc. 189. Br. Ab. Resc. 42. *per* Cokaign. 2 Inst. 346.

(*i*) Keilw. 110, *a*; but see Doct. Plac. 25. Br. Ab. Resceit, 65, by the prothonotaries, *contra*.

(*k*) Greswold v. Holmes, Cro. Eliz. 826. Co. Ent. 334, a. Doct. Pl. 25.

(*l*) 2 Inst. 345.

she cannot even imparl. (*a*) If however, the default of the husband should be before the demandant has counted, as upon the grand cape, it seems clear that he must count against the tenant by receit. (*b*)

Count *de novo.*

Whatever may be the correct rule with respect to the wife, there seems to be no reason for holding, that the reversioner shall plead without the demandant first counting against him (*c*), for though the entry is that he comes *paratus respondere*, yet the statute is not so. According, indeed, to a case in Moor, it is said to have been held that, when the reversioner is received, the demandant shall not count *de novo* against him, but he shall have oyer of the count against the tenant, and shall plead immediately. (*d*)

A feme covert, or reversioner tenant by receit, may vouch or pray in aid, and may plead such pleas as the husband, &c. might have done. (*e*) Tenant by receit may likewise plead certain pleas in abatement as coverture in the demandant, misnomer of himself, &c. (*f*)

Plea by tenant by receit.

If a reversioner prays to be received, and it is counterpleaded, and upon issue joined it is found for him, the judgment is that he be received to defend his right (*g*), upon which the demandant counts *de novo* against him, and the action proceeds between the demandant and the tenant by receit, and the judgment for the tenant by receit is the same upon demurrer to the counterplea. (*h*)

Judgment in receit.

1. For him who prays to be received.

The judgment for the demandant on the default of the party, who prays to be received, is that he recover seisin of the land. (*i*) If the tenant by receit makes default, he is not allowed to save his default (*k*), that is, no grand or petit cape shall issue against him (*l*); but judgment shall be immediately given.

2. For the demandant.

The effect of a default by the tenant by receit, is that he is immediately out of court, and the proceedings are in the same

(*a*) 2 Rol. Ab. 444, l. 54, *quære.* Br. Ab. Resceit, 100. Vernon's case, Dyer, 298, a.

(*b*) Br. Ab. Resc. 14.

(*c*) 2 Inst. 345, Booth, 70. Herne's Pleader, 509, a.

(*d*) Moor, 34; but in Moor, 29, this was denied by the other justices against Dyer, and a distinction was taken between receit by feme and by reversioner; and see Greswold v. Holmes, Cro. Eliz. 826.

(*e*) 2 Inst. 344, 2 Rol. Ab. 445. Vin. Ab. Resc. (S). Rast. Ent. 373, a.

(*f*) Thel. Dig. l. 13, c. 11. Com. Dig. Abatement, (I. 31).

(*g*) Rast. Ent. 373, a.

(*h*) Co. Ent. 334, a.

(*i*) Rast. Ent. 375, a.

(*k*) Doctr. Plac. 24.

(*l*) 2 Rol. Ab. 445, 35.

Judgment in receit.

state as they were before he prayed to be received, for no mention in this case is made, in the record, of the receit. (*a*) The judgment must consequently be entered against the original tenant, and if it is entered against the tenant by receit, it is error. (*b*) So if the receit is admitted, and the tenant by receit pleads, and the issue is found for the demandant, the judgment is entered by default against the original tenant. (*c*) If the reversioner is received and pleads in bar, and the demandant is barred, this saves the freehold of the tenant for life. (*d*)

Judgment in case of termor.

Where a termor is received by the statute of Gloucester, to save his term, even where he pleads a good bar and disproves the title of the demandant, the latter shall have judgment to recover immediately with a *cesset executio*, during the term. (*e*)

Upon receit in an action in which damages are recoverable, the damages shall be taxed against the tenant by receit. (*f*)

Receit at the present day.

It is seldom absolutely necessary at the present day to resort to the practice of receit, for if the demandant recovers, where a person might have been received, the latter may now generally maintain ejectment, as a reversioner in case of a common recovery, for the forfeiture of the particular estate. (*g*) So a wife by virtue of the stat. 32 Hen. 8, c. 28, and a termor by stat. 21 Hen. 8, c. 15. But in other cases, it still seems to be necessary for the reversioner to pray to be received, or otherwise he will be compelled to falsify the judgment in an action of a higher nature. In a writ of right therefore where the tenant for life joins the mise on the mere right, and the reversioner neglects to pray to be received, and the tenant loses, it seems that the reversioner is without remedy, for as he is privy in estate, the judgment is evidence against him, and he cannot falsify it in an action of a higher nature. (*h*)

(*a*) 2 Rol. Ab. 445, l. 40. Br. Ab. Resceit, 45, 69, 120.

(*b*) Kiffin v. Vaughan, Cro. Car. 262.

(*c*) 2 Inst. 351, F. N. B. 156 B, but see Fitz. Ab. *quod ei def.* 17.

(*d*) Br. Ab. Resceit, 132.

(*e*) Br. Ab. Resc. 132. See an entry in Co. Ent. 175, b. (in dower) of demurrer to the plea of the termor. Judgment against the first tenant with a *cesset executio*, till the determination of the demurrer. Default of the termor and judgment against him that the demandant have execution of her dower.

(*f*) Br. Ab. Resceit, 65.

(*g*) Sir W. Pelham's case, 1 Rep. 14, b.

(*h*) Ferrer's case, 6 Rep. 7, a.

Of the Jury Process and Trial.

THE jury process in real actions, is, in general, the same as in personal actions in the Common Pleas. There are, however, some peculiarities, which it will be necessary to notice. They occur principally in writs of right, of dower *unde nihil habet*, of assise, and of *quare impedit*.

In general, in real and mixed actions, the nonsuit of one demandant is not the nonsuit of both. (*a*)

In writ of right.

In a writ of right, when the mise is joined on the mere right, the trial must be by the grand assise, and not by a common jury. (*b*) There are consequently two modes of trial in this action: one by the grand assise when the mise is joined on the mere right, and secondly by a common jury when issue is joined upon any collateral point. In either case, the writ of right may be tried at the assises. (*c*) There was formerly a third mode of trial, viz. by battle, which is abolished by a late statute.

When the trial is by the grand assise, the first process is a writ of summons to assemble four knights, in order to choose the grand assise. (*d*) If the action is to be tried at *nisi prius*, a clause of *nisi prius* ought to be inserted in this writ, which must be in the alternative to summon the four knights into bank, or at the assises if the judges come thither before the day in bank. The clause should run thus, "that they be before our justices on the morrow of all souls, or before our justices assigned to take the assises in and for your county, if they shall first come on Monday the first day of July next, at Abingdon, in your county, according to the form of the statute, in such case made and provided;" for if the writ be to summon them into bank, with a clause of *nisi prius* therein, viz. "unless the justices of

(*a*) Co. Litt. 139, a. *Ante*, p. 172.

(*b*) Tyrrell v. Clarke, 3 Wils. 420. See *ante*, p. 215.

(*c*) 12 H. 7, 10, b. Br. Ab. *Droit de recto*, 28. *Nisi Prius*, 16, 17, 24. Jenk. Cent. 38. Pearson v. Maynard, 1 Taunt. 415. 2 Saund. 45, note.

(*d*) As to the grand assise in a writ of right close, in ancient demesne, see *ante*, p. 24. 1 Salk. 340.

In writ of right.

assise shall first come on, &c. at Abingdon, to hold the assises," it is bad and will be quashed, because that would only be a conditional writ to summon the knights into bank, unless the justices of assise come to Abingdon before the day in bank; but if they do come to Abingdon, there is no precept or command to the sheriff, to summon the knights to make an election of other jurors there, or commission to the judges to swear them. (*a*) If the *nisi prius* clause be omitted, and the knights come up from a distant county to Westminster, the court will not compel them to be sworn, unless the demandant will pay their expenses. (*b*) It seems, that the sheriff should return, that he has summoned them in the alternative, according to the exigence of the writ. The sheriff is not bound to execute the summons before the commission day of the assises, but may summon the knights from the grand jury who are present at the assises; nor is it any part of the sheriff's duty to procure the knights to be sworn. (*c*) If there be not four knights in the county, the sheriff may return others. (*d*) If the four knights do not appear on the first writ of summons, having been summoned, the demandant may sue out an *habeas corpora quatuor militum*, in the alternative, as in the writ of summons. (*e*) Or if the sheriff have not returned the writ, he may issue an *alias* summons. (*f*) After the four knights have appeared and been sworn, and have chosen of themselves and twenty (*g*) others a jury, the next step is to issue

(*a*) Luke v. Harris, 2 Bl. 1261, 1293. 2 Saund. 45, l. note.

(*b*) Pearson v. Maynard, 1 Taunt. 415.

(*c*) Windle v. Ricardo, 3 B. Moore, 249. 1 Brod. and Bing. 17, S. C.

(*d*) Co. Litt. 294, a. See 2 Saund. 45, i. note. Dyer, 247, b. margin.

(*e*) Dyer, 79, b. 104, a. 2 Towns. Jud. 115. Booth, 97, 102. 2 Saund. 45, k, note.

(*f*) Tyssen v. Clarke, 3 Wils. 562.

(*g*) There is some confusion in the books, as to the number of recognitors. Booth says, that the four knights are sworn to chuse, "*twelve* knights *of themselves and others*," (p. 97). In Littleton, s. 514, and Co. Litt. 294, a. the whole number appears to be *sixteen*, viz. twelve recognitors and four knights; so the case in 1 Leon. 303. In the latter case, the knights returned twenty recognitors, of whom twelve were, together with the four knights, sworn upon the grand assise. In Tyssen v. Clarke, 3 Wils. 560, it is said, that the four knights were "sworn to choose *twelve* knights girt with swords of *themselves and others*;" the *venire facias*, contains the names of *twenty-four*, including those of the four knights; and sixteen, including the four knights, were sworn upon the grand assise. It seems, that it would be sufficient for the knights to return *twelve* recognitors; but that, if they return more, it is good. 2 Rol. Ab. 674. Cro. Car. 511, S. C. Hargrave's note to Co. Litt. 159, a, (2). The usual practice is, as stated in the text.

a *venire facias*, to return the jury into bank, as in other actions, and this writ is made returnable on some return day before the trial, as in ordinary cases, and the demandant may then sue out a *habeas corpora recognitorum* in the alternative, like the writ of summons. (*a*) The court have refused to permit the mise joined on the mere right to be tried by a common jury, instead of the grand assise, though both parties desired it. (*b*) Nor will they allow the demandant to quash a writ of summons which has been irregularly executed. (*c*) In writ of right.

When the mise is joined on the mere right, and issue is also joined upon some collateral matter, both the grand assise and a jury must be summoned, and the issue therefore concludes with an award of the summons, *ad eligendam magnam assisam*, and also of the *venire* for a jury; and both processes may accordingly be sued out. (*d*) But in order to prevent the confusion of trying the same cause by two different juries, it has been usual for the parties to consent to a rule, that the special matter shall be given in evidence on the mise joined to the grand assise (*e*); or that the collateral issues shall be tried by the grand assise. (*f*)

When the four knights appear, they are sworn lawfully and truly to choose twenty knights girt with swords, who best know, and will declare and say the truth between the parties; but the recognitors need not, in fact, be knights. (*g*) It is said by Sir Edward Coke, that when the four knights appear, they cannot be challenged, for they are, in law, judges for the purpose of electing the grand assise, and judges cannot be challenged. (*h*) But in the year book, 15 Ed. 4, 1, it is said by Choke and Littleton, justices, that the four knights may be challenged when they and the parties are choosing the recognitors; and that if one be challenged it is to be tried by the other three, and if two be challenged, by the other two; and if three be challenged, a new writ must issue to choose four other knights, for no challenge

(*a*) 2 Saund. 45, k. note.

(*b*) Gulton v. Harvey, 1 Bos. and Pul. 192.

(*c*) Adams v. Radway, 1 Marsh. 602. In this case, the application was made *ex majori cautelâ*, no previous notice of executing the writ of summons to the knights having been served on the tenant's attorney; but *quære* the necessity of such notice.

(*d*) Hardman v. Clegg, Holt's N. P. C. 668.

(*e*) Tyssen v. Clarke, 3 Wilson, 420, 563.

(*f*) A rule to this effect was made in Hardman v. Clegg, Holt's N. P. C. 657, though it does not appear in the report.

(*g*) Wigot v. Clerke, 1 Leon. 303.

(*h*) Co. Litt. 294, a.

In writ of right.

can be tried by less than two. (*a*) If it is thought proper to challenge any of the recognitors, the demandant and tenant may be ordered to go with the four knights to make their challenges before them, to those that shall be chosen by them; for after the panel made by the four knights, no challenge can be made either to the array or to the polls. (*b*)

When the recognitors are called and appear, sixteen of them are sworn. (*c*) The tenant first begins his case, because the mise is first prayed for and joined by him (*d*); but if the tenant tenders the demi-mark, the demandant must begin. (*e*) In a writ of right the grand assise cannot, it is said, give a special verdict. (*f*)

It was said by the court, in a late case (*g*), that it may be doubted how far a new trial ought ever to be granted on a trial at bar in a writ of right; for it is pretty clear, that no attaint lay in such case, and the practice of granting new trials has been chiefly taken up since the disuse of attaints; but cases of fraud may happen wherein a new trial may be necessary, or manifest injustice would be done.

In dower *unde nihil habet.*

If issue be joined on any plea which denies the right of dower, except *ne unques accouple*, and the plea that the husband is alive (*h*), the jury process is the same as in personal actions in the Common Pleas, viz. a *venire facias*, and a *habeas corpora juratorum* (*i*); and by statute 24 Geo. 2, c. 48, s. 4, it is enacted, "that in all writs of dower *unde nihil habet*, after issue joined, it shall not be needful or requisite to have above fifteen days between the teste and return of the *venire facias*, or any other process to be sued out for the trial of the said issue; but that the writ of *venire facias*, and other process after issue joined until judgment be given, having only fifteen

(*a*) And see Ld. Windsor v. St. John, Dyer, 104, a, where one of the four knights was challenged, and Moor, 3.

(*b*) Br. Ab. Droit. 6, 12. Wigot v. Clerke, 1 Leon. 303. Co. Litt. 294, a. 2 Saund. 45, l. note. Vin. Ab. Trial, (P. c. 2).

(*c*) Tyssen v. Clarke, 3 Wils. 541. Litt. sec. 514. 2 Rol. Ab. 674.

(*d*) Heidon v. Ibgrave, 3 Leon. 162.

(*e*) See *ante*, p. 217.

(*f*) Moor, 762.

(*g*) Tyssen v. Clarke, 2 W. Bl. 941.

(*h*) *Ante*, pp. 220, 222.

(*i*) 2 Saund. 44, d, note. Dennis v. Dennis, 2 Saund. 340. Robins v. Crutchley, 2 Wils. 121.

days between the teste and return thereof, shall be good and effectual in law as is used in personal actions."

In dower *unde nihil habet.*

If the tenant pleads that the husband is alive, the trial, as we have seen, is by the examination of witnesses before the justices and not by jury. (*a*) The plea of *ne unques accouple*, &c. is tried by the certificate of the bishop. (*b*)

In assise.

In assise of *novel disseisin*, the sheriff is directed by the original writ, to cause the recognitors or jury, to have a view of the tenements, to return their names, and to summon them to be before the justices at the next assises, to hear the recognition. The sheriff, therefore, annexes a panel to the writ of assise, in which the names of the recognitors are engrossed:

"*Berkshire to wit.*—The names of the recognitors in a certain assise of novel disseisin between A. B. plaintiff, and C. D. defendant, of a freehold in Reading.

"E. F.
"G. H." &c.

to the number of twenty-four, and at the bottom of the panel the sheriff adds the names of the summoners.

If the assise be in the Common Pleas, an *habeas corpora recognitorum* must issue; and if in the King's Bench, a *distringas*, to which the sheriff must annex a panel with the names of the recognitors, as in his return to the writ of assise. (*c*)

The recognitors being thus returned, the sheriff must afterwards, but at least fifteen days before the assises, summon them to appear at some public and convenient place, and when six or more are present, but not exceeding twelve, he is to go with them to view the lands, and when a view has been had, the sheriff must adjourn them to the first day of the next assises, when a full jury of them must appear. At the assises, the writ of assise, the return, and the count being engrossed on parchment (*d*), must be delivered to the clerk of the court, who reads them, the recognitors having been previously called. The plaintiff is then called, and unless he appears, is nonsuited. If he

(*a*) Com. Dig. Trial, (B. 5). Case of Abbot of Strata Marcella, 9 Rep. 30, b. *Ante*, p. 222.
(*b*) Com. Dig. Certificate, (A. 1). *Ante*, p. 220.
(*c*) Lilly's Rep. 20.
(*d*) *Ibid.* 21.

In assise.

appears, the defendant is then called; and, on his not appearing, the counsel for the plaintiff must pray, that the assise may be taken by default, which the court will order. The counsel for the plaintiff then arraigns the assise, by reading a copy of the writ (*a*); after which he reads the count, and prays that the defendant be demanded, which is accordingly done by the clerk of the assise; and if the defendant does not come at the third call, the counsel for the plaintiff again prays, that the assise may be taken by default, which the court will order and the clerk will indorse on the panel, *assisa capiatur per defaltam*. The cause then proceeds; the recognitors are called and sworn, and the plaintiff gives evidence of the seisin and disseisin, &c. (*b*) When an assise is awarded by default, the tenant may still give evidence, and the recognitors may find for him. (*c*)

The above is the mode of proceeding where the defendant makes default; but if he appears, he may pray time to plead; upon which the court will adjourn the cause for a sufficient time, and upon the adjournment day, the cause proceeds, according to the matter pleaded by the defendant. (*d*)

The assise may be adjourned into the Common Pleas, upon any point of difficulty (*e*); and so upon every demurrer, dubious plea, or verdict; and upon every foreign plea, the justices of assise may adjourn the assise to what place they will. (*f*)

The mode in which the plaintiff's title is inquired into before the recognitors in assise, varies according to the form which the pleadings have assumed. A great mass of curious learning upon this subject, is to be found in the older writers; but it will be sufficient in this place to mention some general rules relative to this antiquated branch of real law. On the first institution of the assise, the recognitors had only the power of giving their verdict upon the subject matter stated in the writ; that is, upon the seisin of the plaintiff, and his disseisin by the defendant. If an issue was taken upon any collateral point, it was, in very early times, decided by duel; but afterwards, it became customary to refer the determination of it, by consent of the parties, to a jury. As the recognitors were already assembled, it was, of course, found highly convenient to employ them in the new

(*a*) Lilly's Rep. 24.
(*b*) Lilly's Rep. 28.
(*c*) Co. Litt. 355, a.
(*d*) Lilly's Rep. 33, 34, 35.
(*e*) Magna Charta, c. 12.
(*f*) Br. Ab. Adjournment, 28. Vin. Ab. Assise, (R).

capacity of jurors sworn to try the collateral point, and hence, when an issue of this kind was tendered, the assise was said to be turned into a jury; *vertitur assisa in juratam.* (*a*) After the establishment of this practice, it became usual to take the assise in four different modes, according to the matters which it was necessary to inquire into. 1. In the point of assise. 2. Out of the point of assise. 3. For damages. 4. At large. In assise.

When the assise is taken in the point of assise (that is the seisin and disseisin) it is upon the plea or general issue of *nul tort nul disseisin.* It appears that upon this issue the plaintiff may give in evidence any title which shews him to have been legally seised of the lands from which he has been ousted. (*b*)

An assise, *out of the point of assise* (*c*), is when the tenant pleads some special matter in bar, to shew that the assise ought not to be taken, as a release, in which case the jurors are to inquire into that collateral issue. Whether they are also bound in such case to inquire into the seisin and disseisin, under the title stated, appears to depend upon the fact of the disseisin being confessed or not in the plea. (*d*) Thus a release is held to be an acknowledgement of an ouster, and where the issue is found for the plaintiff the jury shall not therefore inquire over of the seisin and disseisin but only of the damages. (*e*) If on the contrary the title is traversed, and the assise awarded upon the title (that is to try the particular issue joined) yet the seisin and disseisin upon the title shall, it is said, be inquired into. (*f*) The reason of this must be that the disseisin is held not to be admitted by the traverse.

An assise taken for damages is where some special matter, as a traverse of the title, is found against the defendant, in which case the jury must further inquire of the damages. (*g*) Thus in an assise, if the tenant says that J. S. was seised of the land, and acknowledged a statute to him, by which he extended the land, &c. and the plaintiff takes issue that J. S. was not seised of the land at the time of the statute acknowledged, and this is found

(*a*) See 1 Reeves' Hist. 336. Gilb. Hist. C. P. 59.

(*b*) 1 Rol. Ab. 277, l. 33.

(*c*) Dyer, 311, a.

(*d*) 1 Rol. Ab. 273, l. 19, &c. Br. Ab. Ass. 346, 260, 156. Booth, 284.

(*e*) Br. Ab. Ass. 156, but see Cheney's case, 10 Rep. 119, a.

(*f*) 1 Rol. Ab. 274, l. 30, but *quære*, whether in this case the disseisin is not admitted, Br. Ab. Assise, 276, in which case the jury should only inquire of the damages, and see 1 Rol. Ab. 275, l. 1.

(*g*) Br. Ab. Assise, 276.

In assise.

against the tenant, it shall not be inquired of the points of the writ, but of the damages only, for the seisin is acknowledged. (*a*)

The assise is taken at large whenever the defendant attempts to put some particular matter in issue and fails in so doing, either by bad pleading or by making default. In these cases the assise cannot be taken *out of the point of assise*, for that is only when there is some collateral issue joined to be tried; nor can it be taken in right of damages, for that is only when the collateral issue has been found against the defendant, or he has confessed the action; it is therefore taken at large, that is to say, in the same manner, as if the defendant had pleaded, *nul tort nul disseisin*. Thus in an assise, if the tenant pleads in bar and the plaintiff makes title, and the tenant does not answer or traverse the title, the assise shall be awarded at large and not upon the title, inasmuch as the title is not put in issue, and if any other title is found for the plaintiff he shall recover (*b*), and so if the tenant pleads the release of the plaintiff in bar, and afterwards makes default, the assise shall be taken at large. (*c*) There are also some cases in which the assise is taken at large in respect of the person of the plaintiff, as where the assise is brought by an infant, when, although a bar be pleaded by the tenant, the assise is to be taken at large. (*d*) It seems too, that when a plea in abatement, which only goes to the person of the plaintiff, is found against the defendant, yet the assise shall afterwards be taken at large (*e*), and if the tenant vouches, and the voucher is counterpleaded, and the counterplea found for the demandant, the assise must be taken at large and the points inquired into. (*f*)

In assise of *mortd'ancestor*.

The jury in an assise of *mortd'ancestor* are summoned in the manner before pointed out with regard to assises generally, and the assise is taken either in the point of assise or for damages, &c. as above mentioned. The points of the assise in *mortd'ancestor* are three, viz. Seisin in fee of the ancestor on the day of

(*a*) 1 Rol. Ab. 274, l. 13. Br. Ab. Ass. 256.

(*b*) 1 Rol. Ab. 274, l. 36. Br. Ab. Assise, 282.

(*c*) 1 Rol. Ab. 274, l. 47.

(*d*) 1 Rol. Ab. 275, (L). Vin. Ab. Assise, (L. M. N. O. P.), Gilb. Hist. C. P. 60.

(*e*) 1 Rol. Ab. 273, l. 41. 2 Inst. 399, in *mortd'ancestor*. Booth, 284.

(*f*) Dyer, 311, a. 2 Inst. 399.

his death. 2. The dying seised within fifty years before the commencement of the suit; and, thirdly, whether the plaintiff be the next heir. (*a*) These points are not to be inquired into where the assise is taken out of the points of assise, or merely in right of damages, but if issue is joined on one of the three points, it seems that the others must be inquired into. (*b*) It should be observed that in actions of aiel, besaiel, and cosinage, if default be made at the trial, judgment by default must be given as in other writs of *præcipe quod reddat*, without inquiring into any point of the writ. (*c*)

In assise of *mortd'ancestor.*

In *quare impedit* the issue is made up, and the parties proceed to trial, as in ordinary cases; but in consequence of the provisions of the statute of Westminster 2, c. 5, giving damages in writs of *quare impedit*, there are four points which must be inquired into at the trial. 1. Whether the church be full. 2. If full, of whose presentation. 3. If six months (*d*) have elapsed between voidance and action brought; and 4, the value of the church (*e*), and if the jury omit to inquire of these points at the trial, the omission may be supplied by writ of inquiry (*f*), or the damages may be released. (*g*)

In *quare impedit.*

Many of the issues which occur in *quare impedit* are to be tried by certificate of the ordinary, and not by jury. Thus *able or not able*, if the clerk be alive, must be tried by certificate (*h*); but if he be dead it shall be tried by jury, for the bishop cannot examine him. (*i*) Whether the church is void by deprivation shall be tried by the bishop. (*k*) So *resignation* shall be tried by him (*l*), but *whether the church is void by resignation* shall be tried by jury, for the avoidance is notorious, and the resignation, which is a spiritual act, is only evidence of that. (*m*) The

(*a*) 2 Inst. 399. Booth, 207.

(*b*) Dyer, 311, a. Booth, 207. 2 Inst. 399.

(*c*) 2 Inst. 399.

(*d*) These are calender months, *ante*, p. 233, note, (*f*).

(*e*) Dyer, 135, a. Keilway, 57, b. Boswell's case, 6 Rep. 51. 2 Mall. *quare imp.* 86. Wats. Clerg. Law, 283. and see *post*, in title "Damages?"

(*f*) Dyer, 135, a. 2 Town. Judg. 191. Cheyney's case, 10 Rep. 118, b. Wats. Clerg. Law, 283.

(*g*) Dyer, 135, a, and see *post*, in title "Damages."

(*h*) 2 Rol. Ab. 583, l. 39. Com. Dig. Certificate, (A. 1). Trials *per pais* 22. Vin. Ab. Trial, (O); and see 12 Rep. 67.

(*i*) 2 Rol. Ab. 583, l. 42.

(*k*) *Ibid*, l. 44.

(*l*) *Ibid*, l. 46.

(*m*) *Ibid*, l. 47. 12 Rep. 68.

In *quare impedit.*

plea of plenarty, or *full or not full*, shall be tried by the spiritual law, because the church is full by institution, which is a spiritual act (*a*), but *void or not void* shall be tried by the common law. (*b*) *Institution*, which is a spiritual act, shall be tried by the bishop's certificate. (*c*)

Induction, which is notorious to the country, shall be tried by jury (*d*), so if the issue be on institution *and* induction, the trial shall be by jury, for the common law is preferred. (*e*) And where matter of spiritual cognizance is mixed and entangled with matter of temporal cognisance, it shall be tried by the country. (*f*) As both parties are actors in *quare impedit*, either the plaintiff or defendant may carry down the cause for trial. (*g*)

(*a*) 2 Rol. Ab. 583, l. 51. Co. Litt. 344, a; but the jury at the trial may inquire whether the church be full or not. See above.

(*b*) *Ibid.*

(*c*) 2 Rol. Ab. 584, l. 3. Trials *per pais*, 22.

(*d*) 2 Rol. Ab. 584, l. 5. Boswell's case, 6 Rep. 49, a.

(*e*) 2 Rol. Ab. 584, l. 7.

(*f*) Com. Dig. Trial, (A. 3).

(*g*) Banks's case, 2 Salk. 652. Tidd's Pr. 820, (8th edit.).

Of Damages.

In general.

In real actions, properly so called, no damages are recoverable, but in certain real actions they have been given by various statutes; as in dower, entry *sur disseisin*, *mortd'ancestor*, &c. and though such actions are, strictly speaking, *mixed*, they are yet usually denominated real actions. (*a*) In cases in which damages have been superadded by statute, the old form of declaring remains, and the plaintiff does not demand damages either in his writ or count (*b*), but in certain mixed actions, as in waste (*c*) and *warrantia chartæ*, the plaintiff demands damages in his declaration. (*d*) In an assise of *novel disseisin*, which is properly a mixed action, damages were recoverable at common law against a disseisor. (*e*)

In real actions in which damages have not been given by statute, no damages are at this day recoverable. Thus they are not recoverable in any writ of right. (*f*) in a *formedon* (*g*), in a writ of partition (*h*), in admeasurement of pasture (*i*), in a *perambulatione faciendâ* (*k*), in a *scire facias* or other writ of execution (*l*), but in a *scire facias* in the nature of a *quare impedit*, between coparceners upon a composition, damages may be given. (*m*)

If a writ of error be brought in delay of execution in a real action and the judgment is affirmed, or the writ of error discontinued, or the plaintiff in error nonsuit, the defendant in error is entitled to recover damages for the delay and wrongful vexation by the statute 3 H. 7, c. 10, even in actions in which originally no damages were recoverable. (*n*)

(*a*) Co. Litt. 285, b. Sayer on Dam. 5.

(*b*) 2 Inst. 286. Pilfold's case, 10 Rep. 117, a. Co. Litt. 285, b. Com. Dig. Dam. (A. 1, 2).

(*c*) Co. Litt. 355, b.

(*d*) See *ante*, p. 176.

(*e*) 2 Inst. 284, and see *post*.

(*f*) Co. Litt. 32, b.

(*g*) 1 Rol. Ab. 574, l. 45.

(*h*) 2 Inst. 289. Countess of Warwick v. Lord Burklye, Noy, 68, and see Noy, 143, yet the plaintiff declares *ad damnum*, Coke's Ent. 410, a.

(*i*) 2 Inst. 368.

(*k*) 1 Rol. Ab. 575, l. 7.

(*l*) 1 Rol. Ab. 574, l. 42. 2 Saund. 72, v. (note).

(*m*) Br. Ab. *sci fa.* 54.

(*n*) Graves v. Short, Cro. Eliz. 616. Hullock on costs, 287; but see Smith v. Smith, Cro. Car. 425, and see *post*, in title "Costs."

In general.

In real actions, in which damages have been given by statute, the damages are only the accessary, and the land, &c. recovered is the principal; and therefore when the jury neglect at the trial to assess the damages, such omission may be supplied by a writ of inquiry, or the damages may be released; neither of which can be done in personal actions where damages only are recoverable. (*a*)

In those real actions in which damages are recoverable, if the tenant vouches and the vouchee enters into the warranty and loses, he shall answer the damages (*b*), and so also with regard to tenant by receit. (*c*)

With regard to the time up to which damages are to be computed, there is a distinction between personal and real actions. In the former, the plaintiff declares for damages, which are the object of the writ, and the principal thing in demand, and he can only recover them up to the time of action brought (*d*), but in the latter, in which the damages are only an accessary, the demandant may in general recover them, in case of verdict, up to the time of verdict, and in case of a writ of inquiry, up to the time of awarding the writ. (*e*) In some actions however, as in dower and *quare impedit*, the time for which the damages shall be recoverable is specified by statute. (*f*) There is a distinction also with regard to actions for the recovery of land and of rent, for in a *præcipe quod reddat*, or assise for rent, of the seisin of the demandant, which is capable of computation, the court may give damages after verdict up to the time of judgment. (*g*)

If one of several coparceners who have suffered damage dies before judgment, the survivors may recover the whole damages (*h*), but after judgment the personal representatives of the party who has obtained judgment and died, will be entitled to the damages. (*i*)

In many cases damages may be severed in real actions. Thus

(*a*) Butler v. Ayre, 1 Leon. 92. Bentham's case, 11 Rep. 56, a. Com. Dig. Dam. (E. 1, 8.) Tidd's Pract. 592. (7th edit.)

(*b*) Br. Ab. Dam. 45. 2 Inst. 288.

(*c*) Br. Ab. Resceit, 65.

(*d*) Com. Dig. Dam. (D); but interest being an accessary may be recovered in a personal action, up to the day when the plaintiff is entitled to sign judgment, 2 Burr. 1087.

(*e*) Pilfold's case, 10 Rep. 117, a. Jenk. Cent. 7.

(*f*) See *post*.

(*g*) Pilfold's case, 10 Rep. 117, a. Jenk. Cent. 7. Br. Ab. Dam. 14, but see *Id.* Dam. 154.

(*h*) Br. Ab. Jointenants, 48.

(*i*) Br. Ab. Dam. 177. Jointenants, 56.

In general.

in assise, double damages under the statute of *conjunctim feoffatis* may be given against one tenant, and single damages against another. (*a*) So where a writ of waste or *mortd'ancestor* is brought by the aunt and niece coparceners. (*b*)

In real actions to which damages have been superadded by statute, the judgment for damages is a separate judgment, and therefore a notice of executing a writ of inquiry must be given in such case, as well as in a personal action. (*c*)

In a writ of mesne.

The plaintiff cannot recover damages in a writ of mesne if it be brought merely to establish the acquittal before distress in the mesne's default (*d*); but if the defendant plead *not distrained in his default* the plaintiff may have judgment for the acquittal immediately, and damages when the issue is tried. (*e*)

In *quod permittat.*

Damages are recoverable in a *quod permittat.* (*f*)

In dower.

No damages were at common law recoverable in this action (*g*), but by the statute of Merton, 20 Hen. 3, c. 1, when widows are deforced of their dower of lands, whereof their husbands have died seised, they shall recover damages to the value of their whole dower from the time of the death of their husbands to the day that by judgment they have recovered seisin of their dower, &c. (*h*)

The statute is confined to cases in which the husband died seised, (*i*) and such seisin must be a seisin of the freehold and inheritance, so that upon the death of the husband the possession immediately devolves upon the heir (*k*), but it is sufficient if the husband dies seised of an estate tail. (*l*) The statute also applies only to a writ of dower *unde nihil habet*, and not to a writ

(*a*) Br. Ab. Dam. 104, and see *post.*

(*b*) Com. Dig. Damages, (B); and see *post.*

(*c*) Strangeways v. Ascough, Rep. of Pr. in C. B. 14. Perkins v. Lambe, 3 Lev. 409. 2 Saund. 45, a, note.

(*d*) 1 Rol. Ab. 575, l. 2. Co. Litt. 100, a. *Ante*, p. 38.

(*e*) Br. Ab. Dam. 196.

(*f*) Baten's case, 9 Rep. 55, a.

(*g*) Park on Dower, 301. Sayer on Dam. 23.

(*h*) 2 Inst. 80.

(*i*) But it is said, that though the husband does not die seised, if the wife demands her dower she may recover damages from the time of the refusal. Jenk. Cent. 45. *sed quære.*

(*k*) Dyer, 284, a. Co. Litt. 32, b.

(*l*) Thynn v. Thynn, Styles, 69.

In dower.

of right of dower, for in no writ of right can damages be recovered. (*a*) The statute extends to copyholds. (*b*) If the heir or his feoffee assigns dower, and the widow accepts it, she cannot afterwards claim damages. (*c*)

But where the husband dies seised, the heir may save himself from damages by coming in upon the summons the first day and pleading *tout temps prist*, in which case no damages are recoverable, and judgment is given immediately for the demandant; though if the widow has previously demanded her dower, she may reply that fact, and the damages will await the trial of that issue (*d*), and the demandant cannot in this case take judgment and pray a writ of inquiry (*e*); but it is said that if the widow admits the plea of *tout temps prist* and takes judgment, although she will not recover mesne profits and damages from the death of her husband to the commencement of the suit, yet she will be entitled to receive them from the commencement of the suit to the award of the writ of inquiry. (*f*) A neglect in the tenant to assign dower upon demand is sufficient, without an actual refusal to entitle the demandant to damages. (*g*) The tenant cannot take any advantage of the demandant's neglect to demand dower, except upon the plea of *tout temps prist* (*h*); but where the demandant after the death of her husband entered upon the lands in demand and continued in possession five years, and afterwards the heir entered, against whom she brought dower, it was said that the tenant need not plead *tout temps prist* after his reentry, for that the time the demandant had occupied was a sufficient recompense for the damages. (*i*) It might, indeed, be a sufficient recompense for the five years, and ought therefore to be allowed in damages, but possession of the lands demanded

(*a*) Co. Litt. 32, b.

(*b*) Co. Litt. 33, a. Copyhold Cases, 4 Rep. 30, b.

(*c*) Co. Litt. 33, a.

(*d*) Co. Litt. 32, b. 33, a. *Ante*, p. 224. See B. N. P. 117, where it is said that though *tout temps prist* be pleaded, damages are recoverable from the teste of the original, to the execution of the writ of entry.

(*e*) Br. Ab. Br. *de enquire*, 18. *Tout temps prist*, 40.

(*f*) 2 Saund. 44, a. (Note 4.) 1 Rich. Pr. C. B. 509. (5th edit.) but *quære*.

(*g*) Corsellis v. Corsellis. Bul. N. P. 117. 1 Cruise Dig. 169.

(*h*) Dobson v. Dobson, Ca. tem. Hard. 19. 2 Barnard. B. R. 180, 207, 443. S. C. Kent v. Kent, 2 Barnard. B. R. 357, B. N. P. 117.

(*i*) Rich's Case, 3 Leon. 52. Dal. 100, S. C. but see Belfield v. Rous, 4 Leon. 198. In the latter case, however, the wife took the profits as guardian, (Moor, 80), and was consequently answerable to the heir, and see Co. Litt. 33, a.

In dower.

for five years appears to be no recompense for the dower for a longer period.

The words of the statute of Merton are, that those who are convicted of a wrongful deforcement shall yield damages, and it may therefore be a question, if a feoffee of the heir, or a person who is in by him in the *per*, shall be charged with damages, without a previous demand of dower, which would render him a deforcer. Damages being given *à morte viri*, the feoffee cannot plead *tout temps prist* (*a*); so that unless a previous demand be necessary, he may be charged without his default. It appears, however, that if he plead a false plea which is found against him, damages may be recovered without any demand, and such damages will be from the death of the husband. (*b*) It is the safer course when the writ is brought against the feoffee of the heir to make a previous demand of dower.

By damages are to be understood the profits of the third part since the death of the husband, (deducting reprises) and such damages as the wife has sustained by the detention of her dower (*c*), which are usually assessed severally, although damages given generally, without finding the value of the land, are good. (*d*) If the lands have been leased for years, before marriage, rendering rent, the wife is entitled to be endowed of the rent (*e*), and the damages must in such case be estimated according to the rent, not according to the value of the land. (*f*) The demandant cannot recover damages for a period during which she would not have been entitled to the beneficial occupation of the lands demanded (*g*); and if the demandant has been in possession under the *habere facias seisinam* damages must not be given for that time. (*h*) Upon damages being adjudged they shall be recovered against the tenant to the writ *in toto*, notwithstanding there may have been several in receipt of the profits successively, since the death of the husband. (*i*)

(*a*) Cp. Litt. 33, a. Bac. Ab. Dower, (I).

(*b*) Belfield v. Rous, 4 Leon. 198. Moor, 80, S. C. Co. Litt. 33, a.

(*c*) Hale's note, Co. Litt. 32, b. (4). Walker v. Nevil, 1 Leon. 56. Penrice v. Penrice, Barnes, 234.

(*d*) Hawes's case, Hetl. 141. Hale's note, *ut supra*.

(*e*) Park on Dower, 346. Winch, 80. *Ante*, p. 223.

(*f*) But see Winch, 80. Which seems misreported as to the point of damages. See Park on dower, 306.

(*g*) Hitchens v. Hitchens, 2 Vern. 404.

(*h*) Walker v. Nevil, 1 Leon. 56.

(*i*) 1 Keble, 86 (margin). Belfield v. Rowse, Moor, 80. Brown v. Smith, Bul. N. P. 117.

In dower.

The damages may be assessed by the jury at the trial, or if this be omitted to be done, it may be supplied by a writ of inquiry. In case of judgment by default or confession, &c. the damages must of course be ascertained by a writ of inquiry. (*a*) This writ commands the sheriff to inquire whether the husband died seised, and if he did, what value the lands are by the year, and how long it is since the husband died, and what damages the wife has sustained by the detention of her dower, and upon the return of the writ of inquiry judgment is entered for the damages. (*b*) The words of the statute of Merton are, that the tenant shall yield damages to the day, that the widow by judgment has recovered seisin of her dower, and although the court of Common Pleas were of opinion that the damages ought to be computed only to the time of the awarding of the writ of inquiry (*c*); yet it seems to be now established that they shall be computed to the time of assessing damages upon the inquisition (*d*), unless the demandant has been in possession any part of the time under the *hab. fac. seisinam.* (*e*)

The judgments for seisin and for damages are distinct, and therefore if the latter judgment be erroneous the damages may be released (*f*), and the judgment *quoad* the land may be affirmed in a writ of error, and the judgment for damages reversed. (*g*) Unless the damages are ascertained by the inquisition, the judgment does not bind the land as to the damages, so as to charge the heir, if the tenant die before they are assessed (*h*), and if the demandant die before the damages are ascertained, his executor shall not have them. (*i*)

No authority was given by the statute of Merton to superior courts, when a writ of error was brought upon a judgment in dower in an inferior court, to give judgment for the value till the time of affirmance, but by statute 16 and 17 Car. 2, c. 8, the

(*a*) Hale's note, Co. Litt. 32, b. (4) 2 Towns. Judgm. 100.

(*b*) Rast. Ent. 238, a, b. 2 Saund. 44, e. note.

(*c*) Penrice v. Penrice, Barnes, 234.

(*d*) Dobson v. Dobson, cases temp. Hardw. 19. Spiller v. Andrews, Lil. Ent. 189, incorrectly reported, 8 Mod. 25. Thynne v. Thynne, Styles, 69. Hale's note, Co. Litt. 32, b. (4). Park on Dower, 308. B. N. P. 117.

(*e*) Walker v. Nevil, 1 Leon. 56.

(*f*) Butler v. Ayre, 1 Leon. 92.

(*g*) Kent v. Kent, cases temp. Hardw. 50. Hale's note, Co. Litt. 32, b. (4). 2 Ld. Raym. 1385, *arg.* Specot's case, 5 Rep. 58, b. 59, a; but see Glefold v. Carr, 1 Brownl. 127.

(*h*) Aleway v. Roberts, 1 Keb. 85, 171, 646, 711. 1 Sid. 188. 1 Lev. 58, S. C.

(*i*) Mordaunt v. Thorold, Carth. 133. 1 Salk. 252, S. C.

In dower.

court wherein execution ought to be granted upon affirmance of the judgment, shall issue a writ to inquire as well of the mesne profits as of the damages by any waste committed after the first judgment in dower, and upon the return thereof judgment shall be given, and execution awarded. (*a*) By the same statute bail in error is required after verdict in a writ of dower. (*b*)

If the demandant obtains damages in a writ of dower, she is entitled to costs, by the statute of Gloucester. (*c*)

In a writ of admeasurement of dower, the plaintiff may recover damages, but the defendant to excuse himself, may plead at the first day that he is ready to admeasure. (*d*)

In assise of *novel disseisin*.

An assise of *novel disseisin* was at common law in some degree a mixed action, for damages were recoverable in it against the disseisor (*e*), but not against the alienee of the disseisor, and therefore by the statute of Gloucester, 6 Ed. 1, c. 1, it is enacted, that if disseisors do alien the lands, and have not whereof damages may be levied, they, to whose hands the tenements shall come, shall be charged with the damages, so that every one shall answer for his time. Not only an alienee of the disseisor, but also a tenant who comes in by wrong, is within the statute, but not a tenant for years, by statute staple, &c. unless the assise be brought by a tenant by statute staple, &c. (*f*) If the disseisor alone can pay the whole damages, he alone must be charged, and therefore the assise must find whether he is sufficient. (*g*) The mean occupiers may be named in the assise, and if the disseisor be found insufficient, damages may be recovered against them, each for his time, and if they be insufficient, the tenant shall answer for all. Several judgments, however, shall not be given against each, but the damages may be apportioned on the execution. (*h*) In cases in which double and treble damages are given by statute in assise, every mean tenant under the disseisor shall, on the insufficiency of the latter, answer the double or treble damages for his own time. (*i*) If the assise be brought

(*a*) Kent v. Kent, Cases temp. Hardw. 50. 2 Str. 971, S. C. Park on Dower, 311.

(*b*) Tidd's Pr. 1195, 7th edit.

(*c*) *Vide post.*

(*d*) 2 Inst. 368. 1 Rol. Ab. 573, l. 46.

(*e*) Stat. Gloucester, c. 1. 2 Inst. 284. Sayer on Dam. 7. Vin. Ab. Dam. (G.) Booth, 287.

(*f*) 2 Inst. 284.

(*g*) 2 Inst. 285.

(*h*) 2 Inst. 285. Br. Ab. Ass. 318.

(*i*) 2 Inst. 285. See the cases in which double and treble damages are recoverable. Booth, 287.

In assise.

by a reversioner, upon an estate for years or at will, he cannot recover damages, because the profits do not belong to him. (*a*) If the demandant, pending the assise, enter into part of the land, he cannot recover damages as to the residue, for they are entire, and cannot be severed. (*b*) Double damages may be given in assise against one defendant, and single damages against another. (*c*)

In redisseisin and post disseisin.

Single damages are given in these actions by the statute of Merton, c. 3, and double damages by the statute of Westminster 2, c. 26. (*d*)

In assise of *mortd'ancestor*.

At common law, no damages were recoverable in *mortd'ancestor* (*e*), but by the statute of Marlebridge, c. 16, if the lord will not render to the heir at full age, the land which he has had in ward, the latter in a writ of *mortd'ancestor* may recover damages, and so if the heir was of full age at the time of his ancestor's death, and the lord put such heir out of possession maliciously. By the statute of Gloucester, c. 1, reciting that before that time damages were not awarded in a plea of *mortd'ancestor*, but where the land was recovered against the chief lord, it is enacted, that from thenceforth damages shall be awarded in all cases where a man recovers in assise of *mortd'ancestor*, as before is said in assise of *novel disseisin*. The writ of *mortd'ancestor* is brought against the tenant of the land, and as there is no clause, as in the case of assise of *novel disseisin*, that the tenant shall only answer for his own time, the whole damages may be recovered against him from the time of the abatement. (*f*) If a man dies leaving two sons, and a stranger abates, and the eldest son dies, the younger son in a *mortd'ancestor* shall recover damages from the time of his father's death, to whom he makes himself heir. (*g*) If a father leaves issue two daughters, and a stranger abates, and one of the sisters dies leaving a daughter, and the aunt and the niece join in a *mortd'ancestor*, the aunt alone shall recover damages up to the death of her sister, and she and the niece from that time. (*h*) If the tenant vouches, and the vouchee enters into the warranty and loses, damages may be recovered against him. (*i*)

(*a*) 2 Inst. 285. Crumwell v. Andrews, Dyer, 355, a.
(*b*) Br. Ab. Dam. 180.
(*c*) Br. Ab. Dam. 104.
(*d*) 2 Inst. 416. Co. Litt. 154, a.
(*e*) 2 Inst. 287.
(*f*) 2 Inst. 287. Sayer on Dam. 18.
(*g*) 2 Inst. 287. Fitz. Ab. Dam. 121. Doct. and Stud. l. ii. c. 12; but see Br. Ab. Dam. 160.
(*h*) 2 Inst. 288. Br. Ab. Dam. 51.
(*i*) 2 Inst. 287.

No damages were at common law recoverable in entry *sur disseisin*, but by stat. of Glouc. c. 1, it is provided, that the disseissee shall recover damages in a writ of entry against him that is found tenant after the disseisor. (*a*) The heir of the disseisee cannot recover damages under this clause, because the disseisee himself is only named, but he may have damages under the last clause of the same chapter, that every person shall from henceforth be compelled to render damages, where land is recovered against him upon his own intrusion or his own act. (*b*) Those who come in in the *post* by wrong after the disseisin, as a second disseisor, are within the statute (*c*), but not those who come in merely by act of law, as the lord by *escheat*, or the heir of an alienee of the disseisor, unless they enter and take the profits. (*d*) The clause that each shall answer for his own time, only applies to an assise of *novel disseisin*, and not to a writ of entry; the tenant therefore in the latter action must answer the whole damages (*e*), but if the action be brought by the heir of the disseisee, he can only recover damages from the death of his ancestor. (*f*) If one of two tenants disclaims, and the other pleads in bar for the whole, he may be charged with the whole damages, because he has taken upon himself the whole tenancy (*g*); and damages may be given against a vouchee. (*h*)

In a writ of entry *sur disseisin*.

It seems that by the last clause of the statute of Gloucester, c. 1, in all writs of entry against an intruder, abator, disseisor, or other wrong doer, himself, the demandant may recover damages. (*i*)

In other writs of entry.

By the statute of Westminster 2, c. 5, it is enacted, that, in writs of *quare impedit*, and *darrein presentment*, damages shall be awarded, to wit, if the time of six months shall pass, by the disturbance of any person, so that the bishop do collate to the church, and the true patron lose his presentation for that time, damages shall be awarded to two years value of the church; and if the time of six months shall not pass, but the present-

In *quare impedit*.

(*a*) 2 Inst. 286. Sayer on Dam. 13.
(*b*) 2 Inst. 286; but see Dyer, 370, b.
(*c*) 2 Inst. 286.
(*d*) 2 Inst. 286; and if an action be brought, they may plead, that they never took the profits. *Ibid.*
(*e*) 2 Inst. 286.
(*f*) 2 Inst. 286.
(*g*) 2 Inst. 287.
(*h*) 2 Inst. 287.
(*i*) 2 Inst. 289, and *quære* whether damages would be recoverable in such writs of entry in the *per*. It should seem not.

In *quare impedit.*

ment be deraigned within the said time, then damages shall be awarded to half a year's value of the church.

The value of the church is to be estimated according to the sum for which it might have been let. (*a*) The two years value, or double damages, are given for the loss of the presentation; the half-year's, or single damages, when the presentation has not been lost; therefore, the plaintiff cannot both recover the turn and have double damages. Thus if six months have passed, and the bishop has not collated, and the plaintiff recovers in *quare impedit*, he may either pray a writ to the bishop, and recover single damages, or he may abandon his right to present for that turn, and recover double damages. (*b*) And though the bishop have collated, if his incumbent be removed by the judgment, the plaintiff shall recover damages for half a year only. (*c*) When the church is void, it has been doubted whether even single damages can be given (*d*); but it seems, that damages for the six months are in such case given by the statute of Westminster 2. (*e*) Judgment for single damages, when they should be double, is not assignable by the defendant for error. (*f*)

Damages are only recoverable by this act against such as are disturbers (*g*); and, therefore, if the ordinary disclaims, and the plaintiff takes judgment against him with a *cesset executio*, no damages are recoverable against him; but the plaintiff may, if he pleases, maintain that the bishop is a disturber; and if that issue be found for him, he shall recover damages against the bishop. (*h*) But if the plaintiff be at issue with any other of the defendants, and the title is found for the plaintiff, the other defendants shall alone answer the damages; for it is said, that the inquest shall not pass between the plaintiff and the bishop, even though issue upon the disturbance be joined between them. (*i*) If the incumbent plead *ne disturba pas*, the plaintiff may either take judgment presently, or maintain the disturbance for dam-

(*a*) 2 Inst. 363. Wats. Cl. Law, 292. Sayer on Dam. 35.
(*b*) 2 Inst. 363.
(*c*) 2 Inst. 363.
(*d*) Holt v. Holland, 3 Lev. 59. Bul. N. P. 125.
(*e*) Wats. Cler. Law, 293.
(*f*) Jenk. Cent. 206.
(*g*) 2 Inst. 363, 438.
(*h*) Brickhead v. Abp. of York, Hob. 198; and see *ante*, p. 231, *quære*, whether the whole damages may be levied upon one of several disturbers. Wats. Cler. Law, 294. It should seem that they may.
(*i*) Jenk. Cent. 10. Wats. Cler. Law, 293, *quære*.

ages. (*a*) It seems, that when judgment is given upon the abatement of a writ, no damages are recoverable, for no disturbance has been proved. (*b*)

In *quare impedit.*

But when the plaintiff is nonsuited, it is said, that the ordinary may recover damages (*c*); and so may the incumbent, if judgment be given for him. (*d*)

In a *quare impedit*, no damages are recoverable by the king, for he is not within the statute of Westminster 2 (*e*); and yet he counts to damages. (*f*)

The law relative to damages in *quare impedit*, applies, in general, to an assise of *darrein presentment*, (*g*)

In *darrein presentment.*

In waste against a guardian in chivalry, a tenant in dower, and, as it seems, a tenant by the curtesy, damages to the value of the waste done were recoverable at common law (*h*); and by the statute of Marlebridge, c. 24, it is enacted, that farmers, that is, tenants for life or years (*i*), shall not make waste, &c. without special licence, which thing if they do, and thereof be convicted, they shall yield full damages. By the statute of Gloucester, c. 5, he who shall be attainted of waste, shall lose the thing wasted; and moreover, shall recompence thrice so much as the waste shall be taxed at. Under this statute, it is said, that the plaintiff cannot recover damages for any waste done pending the writ. (*k*) The treble damages alone, and not the land, are recoverable when the writ is brought in the *tenuit*. (*l*)

In waste.

If there be two jointenants for life, or years, and one of them commits waste, this is the waste of both, as to the place wasted; but the treble damages shall be recovered against him only who did the waste. (*m*) The heir cannot recover damages for waste done in the time of his ancestor (*n*); and if the ancestor obtain

(*a*) Colt v. Bp. of Lichfield, Hob. 168. R. v. Bp. of Worcester, Vaugh. 58; but see Br. Ab. Br. Al. Ev. 14, where it is said, that the plaintiff may have a writ to the bishop awarded, and also a writ of inquiry for the damages. Sayer on Dam. 38.

(*b*) Wats. Cler. Law, 294.

(*c*) 22 H. 6, 27. Wats. Cler. Law. 295.

(*d*) 1 Brownl. 159.

(*e*) Bonwel's case, 6 Rep. 56, a. Com. Dig. Dam. (A. 3.) Wats. Cler. Law, 294.

(*f*) Roll v. Osborn, Hob. 23.

(*g*) Sayer on Dam. 38.

(*h*) 2 Inst. 300. See *ante*, p. 110, as to waste, at common law.

(*i*) 2 Inst. 145.

(*k*) Foljambe's case, 5 Rep. 115, b. 2 Inst. 304. But see Br. Ab. Dam. 46. 188, *contra*.

(*l*) 2 Inst. 304. See *ante*, p. 123.

(*m*) 2 Inst. 302.

(*n*) 2 Inst. 305.

In waste.

judgment for the place wasted, and damages, and die before execution executed, the land shall descend to his heir, and the damages shall go to his personal representative. (*a*) If the aunt and the niece join, as they may, in an action of waste, for waste done in the time of the sister of the aunt, the two shall have judgment to recover the place wasted, and the aunt alone shall have judgment to recover the damages. (*b*) So if tenant for life and he in reversion join in a lease, and bring waste, it is said, that the lessee for life shall recover the place wasted, and he in reversion damages. (*c*)

If the damages are found under forty pence, judgment shall be given for the defendant. (*d*)

In a writ of waste, the plaintiff counts to damages, and the jury cannot give greater damages than are laid in the declaration. (*e*)

In a writ of *cosinage, aiel,* or *besaiel.*

Before the statute of Gloucester, no damages were recoverable in a writ of *cosinage, aiel,* or *besaiel;* but by that statute, c. 1, damages are given. The demandant can only recover damages from the death of his next immediate ancestor, whose heir he is; and, therefore, if there be grandfather, father, and son, and the grandfather dies seised, and a stranger abates, and the father dies, the son, in a writ of *aiel,* must make title as son and heir to the father, who was son and heir to the grandfather, and can only recover damages from the death of the father. (*f*)

In *nuper obiit.*

By the statute of Gloucester, c. 1, damages are, it is said, recoverable in a *nuper obiit.* (*g*)

In a *warrantia chartæ.*

In a *warrantia chartæ,* brought *quia timet,* in which the plaintiff recovers judgment, *pro loco et tempore,* although he counts to damages, yet they shall not be given. (*h*) But damages are recoverable if the land has been lost. (*i*)

(*a*) Br. Ab. Dam. 177.
(*b*) 2 Inst. 305. Keilway, 105. Br. Ab. Damages, 31. Com. Dig. Damages, (B).
(*c*) Co. Litt. 42, a. *Ante,* p. 108.
(*d*) *Vide* in "Judgment," *post.*
(*e*) Pilfold's case, 10 Rep. 117, b.
(*f*) 2 Inst. 288.
(*g*) 2 Inst. 288. But see Fitz. Ab. Dam. 19. Br. Ab. Dam. 66. 2 Rol. Ab. 575, l. 6, *contra.*
(*h*) Roll v. Osborn, Hob. 23. 1 Rol. Ab. 574, l. 50. But see Br. Ab. Dam. 183, and F. N. B. 134 K, note (*d*).
(*i*) 1 Rol. Ab. 575, l. 5. Roll v. Osborn, Hob. 23.

In a *curia claudenda*, damages may be recovered. (*a*)

In a *curia claudenda.*

In a writ of *deceit*, to recover lands lost by default, in consequence of non summons, the plaintiff recovers the mesne issues, by way of damages. It seems, that these issues should be accounted from the time of execution sued in the former writ (*b*), up to the time of judgment given in the writ of *deceit*. (*c*)

In *deceit.*

(*a*) Br. Ab. Dam. 118.

(*b*) 1 Rol. Ab. 623, l. 21. But in East. Ent. 224, b. it is from the time of judgment given; so Booth, 252.

(*c*) 1 Rol. Ab. 623, l. 25; *quære* up to the time of verdict or writ of inquiry awarded.

Of Costs.

Costs for demandant.

It has been shewn, that at common law no damages were recoverable in real actions, with the exception of an assise of *novel disseisin*, in which damages were awarded against the disseisor, and of an action of waste against guardian in chivalry, tenant in dower, and, as it seems, against tenant by the curtesy. (*a*) At common law, therefore, no costs were recoverable in general, in real actions; for though, before the statute of Gloucester, it is said to have been usual to include and consider the costs in the damages (*b*): yet when no damages were recoverable, no costs could be given.

The first statute by which costs were given, is the statute of Marlebridge, 52 Hen. 6, c. 6, which enacts, that the tenant in a writ of right of ward, shall, in the case therein mentioned, recover his damages and costs; but this enactment only applying to a feoffee of land held by knight's service, has become obsolete by the abolition of the military tenures. (*c*)

The next statute which gave costs, is the statute of Gloucester, 6 Ed. 1, c. 1, the same statute which, as it has been seen, gave damages in many real actions. By that statute, it is enacted, that whereas, before time, damages were not taxed, but to the value of the issues of the land, it is provided, that the demandant may recover against the tenant the costs of his writ purchased, together with his damages aforesaid; and that this act shall hold place in all cases where the party is to recover damages. The *costs of the writ* extend to all the legal costs of the suit. (*d*)

Where a writ abates by the act of God, and a new writ is purchased by journeys accounts, the plaintiff may recover the costs of the first writ, and the proceedings thereon; but it is otherwise if the first writ abates by the default of the plaintiff. (*e*)

(*a*) See *ante*, pp. 313, 317.
(*b*) Gilb. Hist. C. B. 266. 3 Bl. Com. 399. 1 Hull. on Costs, 2.
(*c*) 1 Hull. on Costs, 2.
(*d*) 2 Inst. 288. Witham v. Hill, 2 Wils. 91.
(*e*) 2 Inst. 288. Br. Ab. Costs, 15.

Costs for demandant.

The rule laid down in Pilfold's case (*a*), that the statute of Gloucester only gives costs where the plaintiff could recover damages before, or by that act (*b*), although it has been questioned in some cases (*c*), seems to remain unshaken in its application to real actions. Costs, therefore, are never given in any real action, in which damages were not recoverable either before or by virtue of the statute of Gloucester, c. 1, or in which costs are not expressly given by some subsequent statute. Thus it has been held, that no costs are recoverable in a writ of right, and, consequently, the tenant cannot have any costs on a judgment, as in case of a nonsuit in that action. (*d*) So in a *quare impedit*, no costs can be recovered, for damages are given in that action by a statute subsequent to the statute of Gloucester (*e*); nor in a *formedon* (*f*); nor in a *quod permittat* (*g*); nor in a writ of partition. (*h*)

It has been determined in a recent case, that costs, in interlocutory proceedings, as on applications to amend, which rest in the discretion of the court, may be allowed in real actions, in which no costs are recoverable on final judgment. (*i*)

In those real actions in which damages are recoverable, if the tenant vouches, and the vouchee enters into the warranty and loses, as the damages are recoverable against the vouchee, or tenant by receit (*k*), it should seem, that he would also be liable to pay costs, where costs are recoverable against the tenant.

In dower.

Damages being given by the statute of Merton, in a writ of dower *unde nihil habet*, when the husband dies seised, costs are likewise recoverable, in that case, by virtue of the statute of Gloucester, but not in a writ of right of dower. (*l*)

(*a*) 10 Rep. 116, a.

(*b*) As to the actions in which damages are given by that act. See *ante*, title "Damages."

(*c*) Witham v. Hill, 2 Wils. 91. Jackson v. Inhab. of Calesworth, 1 T. R. 72. But see Wilkinson v. Allot, Cowp. 367. Tidd. Pr. 988, 7th edit. 1 Hull. Costs, 13.

(*d*) Newman v. Goodman, 2 W. Bl. 1093, 1110.

(*e*) Pilfold's case, 10 Rep. 116, a. Kellw. 26, a. James v. Tintney, W. Jones, 434. 2 Inst. 289. Boswel's case, 6 Rep. 51, a. Lomax v. Bp. of Lond. Barnes, 139. Bull. N. P. 328. 1 Hullock's Costs, 5.

(*f*) Graves v. Short, Cro. Eliz. 616. Scot v. Perry, 2 W. Bl. 758.

(*g*) Penruddock v. Clarke, Cro. Eliz. 659.

(*h*) See Allnatt on Partition, and 2 Ves. Jun. 569, *arg.*

(*i*) Denman v. Bull, 2 Bing. 387. See *post*, p. 324.

(*k*) Br. Ab. Damages, 45. Resceit, 65. *Ante*, p. 308.

(*l*) See *ante*, p. 309. Hale's note, Co. Litt. 32, b. (4). 1 Br. Ch. C. 134. 2 Ves. J. 128; and *quære* as to the costs when the tenant pleads *tout temps prist*, and saves himself from damages.

Costs for demandant.

In waste.

In an action of waste against guardian, tenant in dower, and, as it seems, against tenant by the curtesy, damages were recoverable at common law (*a*), and treble damages are given by the statute of Gloucester, c. 5, in such actions; costs therefore are recoverable by the statute of Gloucester, c. 1; but in an action of waste, founded upon the statute of Gloucester, c. 5, by which an action of waste is given against tenant for life and years, with treble damages, it seems that no costs are recoverable, the action and damages being newly given by the statute of Gloucester, c. 5. (*b*) It might, however, be contended, upon the principle which appears to have governed the courts in several late cases (*c*), that as damages were recoverable by the statute of Marlbridge, c. 24, in a prohibition against tenant for life or years, for waste, costs ought to be given by virtue of the subsequent statute of Gloucester, c. 1, in such cases, although the nature of the remedy is now changed, a writ of waste under the statute of Gloucester, c. 5, having superseded the remedy by prohibition; nor are there wanting authorities to shew, that costs may be awarded against a tenant for life or years, who commits waste. (*d*)

By statute 8 and 9 W. 3, c. 11, s. 3, it is enacted, that in all actions of waste, wherein the single value or damage, found by the jury, shall not exceed the sum of twenty nobles, the plaintiff obtaining judgment, or any award of execution, after plea pleaded or demurrer joined therein, shall likewise recover his costs of suit; and if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs, and have execution for the same by *capias ad satisfaciendum, fieri facias, or elegit.*

Whenever a statute, subsequent to that of Gloucester, increases the damages to the double, or treble value, in a case where damages were recoverable at common law, the demandant in an action on such statute, shall not only recover the double or treble damages, but also double or treble costs; and this notwithstanding the statute increasing the damages, makes no mention of costs. (*e*) Thus in an action of waste against tenant

(*a*) See *ante*, p. 317.

(*b*) 2 Inst. 289. Pilfold's case, 10 Rep. 116, b. Keilw. 26, a. North v. Wingate, Cro. Car. 560. 1 Hull. on Costs, 5, 6, 300.

(*c*) Jackson v. Inhabitants of Calesworth, 1 T. R. 72; and see *ante*, p. 321.

(*d*) 5 H. 5, 13, a. Br. Ab. Waste, 72.

(*e*) 2 Hull. on Costs, 479. 2 Inst. 289.

in dower, and, as it seems, against tenant by the curtesy, treble costs may be recovered, because single damages were given at common law, and treble damages added by the statute of Gloucester, c. 5. (*a*) Costs for demandant.

It is laid down as a rule in Pilfold's case, that in all cases where a man shall recover damages, he shall recover costs, which is meant of all cases, where he shall recover damages, either before the said act of 6 Ed. 1, *or by the said act.* (*b*) It has been already shewn in what actions damages are recoverable by that statute. (*c*) Costs therefore may be recovered in assise of novel disseisin, or of *mortd'ancestor*, in a writ of entry *sur disseisin*, and in other writs of entry against an intruder (*d*), disseisor, abator, or other wrong doer himself. So according to Sir Edward Coke, costs are recoverable in a *nuper obiit*. So in a writ of *aiel, besaiel*, or *cosinage*. In other actions.

So in those writs in which damages were recoverable at common law, as in *attaint*, in *warrantia chartæ* after a loss (*e*), in a writ of mesne (*f*), in a writ of ward, and in a *curia claudenda*, costs are also recoverable. (*g*)

In a real action, if the jury give damages and costs where no costs are recoverable, and judgment is entered *nullo habito respectu* of the costs, and the court awards that the demandant shall recover his damages, this special entry without any release of the costs will help the error. (*h*)

In those real actions, in which costs are recoverable against the tenant, the latter, if he has a verdict given for him, or the demandant is nonsuited, is entitled to costs by statute 4 Jac. 1, c. 3. (*i*) Costs for tenant.

The 8 and 9 W. 3, c. 11, s. 2, which gives costs to a tenant, who recovers judgment on demurrer, does not extend to those actions in which costs are not recoverable in case of verdict, nor to give the tenant costs in cases in which the demandant could not have recovered them. (*k*) Thus when judgment was given for

(*a*) 1 Hull. on Costs, 301.
(*b*) 10 Rep. 116, a.
(*c*) *Ante*, title "Damages."
(*d*) 2 Inst. 289.
(*e*) See Thomas v. Bligh, 3 Lev. 321.
(*f*) Litt. s. 142.
(*g*) *Ante*, p. 319.
(*h*) Grange v. Denny, 3 Bulst. 174. Bac. Ab. Error, (K).
(*i*) 1 Hull. Costs, 300; but see 1 Brownl. 28, 29, where it is said, that on a nonsuit in assise, the court refused costs; but *quære*.
(*k*) 1 Hullock's Costs, 145, 146.

Costs for tenant.

the tenant on demurrer, in *formedon* in the remainder, the court held that no costs should be allowed. (*a*) So a defendant obtaining judgment on a demurrer in *quare impedit*, is not entitled to costs. (*b*)

If the demandant in a real action, in which properly no costs are payable, applies to the court for leave to discontinue, costs may be given. Thus in *formedon* the demandant moved to discontinue on payment of costs, but for the tenant it was alleged that two ejectments had been brought for the same premises, which were dropped, after the landlord had entered into the common rule, and it was desired that the costs of those ejectments might also be paid before leave was granted to discontinue the action, but the court refused to tack these costs to the present motion, leaving the parties to their ordinary remedy, and made the rule absolute. (*c*) This case is differently reported in Wilson (*d*), where it is said, that on motion for leave to discontinue, because of some mistake in setting out the estate tail in the writ, the court thought that the plaintiff, as he was asking a favour, ought to pay the costs of an ejectment, brought for the same lands by the plaintiff, as well as those of the *formedon*, which was consented to by the plaintiffs, on being permitted to amend all the proceedings in the *formedon*, and that he had leave to amend accordingly.

Costs in error.

By statute 3 Hen. 7, c. 10, if any tenant or tenants sue, before execution had, any writ of error to reverse a judgment, in delay of execution, if such judgment be affirmed, or the writ of error be discontinued, or the person who sues the writ of error be nonsuited, the person against whom it is brought shall recover his costs and damage for his delay, and wrongful vexation in the same. Under this statute, costs and damages are recoverable in a writ of error, although none were recoverable in the original action. (*e*) Thus in a *quare impedit*, no costs can be given, but in error in *quare impedit*, the defendant is entitled both to damages and costs (*f*), and so in error on a *quod per-*

(*a*) Miller v. Seagrave, Cases Pr. C. P. 25.

(*b*) Thrale v. Bp. of Lond. 1 H. Bl. 530; overruling Anon. Cases in Pr. C. P. 4.

(*c*) Scot v. Perry, 2 W. Bl. 758.

(*d*) 3 Wils. 206. *Ante*, p. 321.

(*e*) 1 Hullock's Costs, 287.

(*f*) Henslow v. Bp. of Sarum, Dyer, 76, b. Gilb. H. C. P. 275. Anon. Cro. Car. 145. E. of Pembroke v. Bostock, Cro. Car. 174. See 2 Str. 931.

mittat. (*a*) So where a judgment in *formedon* was affirmed upon error, it was resolved, that as the words of the stat. 3 Hen. 7, c. 10, are general, and do not mention any particular action, the defendant in error should have costs and damages for the delay of execution, although in the first action no costs or damages were recoverable. (*b*)

Costs in error.

(*a*) Penruddock v. Clarke, Cro. Eliz. 234, 659.

(*b*) Graves v. Short, Cro. Eliz. 616, but see Smith v. Smith, Cro. Car. 425, *contra*, and see Winne v. Lloyd, 1 Lev. 146. T. Raymond, 134. 1 Keilw. 809, 914, S. C. The latter cases however appear to be overruled by Ferguson v. Rawlinson, 2 Str. 1084, see 1 Hal. Costs, 289. Tidd's Pr. 1229, (7th edit.).

Of Judgment.

In general.

JUDGMENTS are either interlocutory or final, but there appears to be only one real action, in which an interlocutory judgment is given, viz. in a writ of partition. There the interlocutory judgment is *quod partitio fiat*, and the final judgment, *quod partitio prædicta firma et stabilis in perpetuum teneatur*. (*a*) In other real actions the judgment, whether upon default, demurrer, confession, or verdict, is final, because the thing demanded is certain. In actions for the recovery of land merely, as a writ of right or *formedon*, the demandant on obtaining a judgment, whether by default, &c. or by verdict, is entitled to take out execution without any further proceeding; but there are other real or rather mixed actions, for the recovery of land and damages also, in which upon default, confession, &c. it is necessary to have a writ of inquiry in order to ascertain the damages. Thus upon a judgment by *nihil dicit* in an action of waste, a writ of inquiry may issue to inquire of the damages, but if the demandant will release (*b*) the damages, he may have execution immediately. (*c*) In such real actions as have had damages superadded to them by statute, as dower and *quare impedit*, the judgments for the recovery of the tenements, and of the damages, are to be regarded as distinct. (*d*) Therefore when a woman recovered in dower by default, and had a writ to inquire of the damages, and error was brought, and pending the writ of error the tenant in the first action died, and the judgment was affirmed, and execution of the lands, and a *sci. fa.* was issued against the heir to shew cause, why the demandant should not have damages, the court held that no damages should be recovered, for the judgment at the time of the tenant's death was wholly complete, as to the land, but not as to the damages; that the judgment to recover the land, and to recover

(*a*) Co. Litt. 167, b.

(*b*) See more as to releasing the damages, *ante*, p. 308.

(*c*) Topping (or Tippin) v. King, Winch, 5. Hutt. 44, S. C., but it is otherwise on a default at the distringas, when there must be a writ of inquiry to inquire of the waste done, by Westm. 2, c. 14, *ante*, p. 154.

(*d*) Br. Ab. Judgm. 122, *Quare imp.* 132.

In general.

the damages are two distinct judgments; and that when the tenant died before judgment given for the damages, the former remained a judgment at common law. (*a*)

In some real actions, the demandant cannot have judgment by default, unless the points of the writ, (that is the whole of his case necessary to be proved in that species of action,) are inquired into. This occurs whenever an assise of novel disseisin or *mort d'ancestor* is taken by default. In the former action the recognitors or jury are bound to inquire into the points of the writ, viz. the seisin of the plaintiff, and his disseisin by the defendant (*b*); and in the latter, into the three usual points; first, whether the ancestor was seised in fee the day of his death; secondly, whether he died within fifty years next before the teste of the writ; and thirdly, whether the demandant is next heir to him. (*c*)

When several defendants sever in pleading, or when one suffers judgment to go by default, or confesses the action, and the other pleads, there is a distinction between personal and real actions. In a personal action, if one defendant pleads a plea which goes to the whole action, another defendant may take advantage of such plea; but in a real action it is otherwise, for every tenant may lose his part of the lands. (*d*) Thus in dower if one pleads a bar which goes to the whole, and the other says that he is, and always has been ready to render dower, the demandant may recover immediately against the latter, and shall not be compelled to wait the trial of the first issue. (*e*) So in *formedon* against two, if one pleads bastardy, and the other confesses the action, the demandant may have judgment for a moiety (*f*); but it seems that the demandant should pray his judgment immediately, and not wait till the issue joined by the other defendants is tried. (*g*) Where one of several tenants suffers judgment by default, yet until the process is determined against the other tenants, the demandant cannot, it is said,

(*a*) Alcuny v. Roberts, 1 Sid. 188. 1 Keble, 85. 1 Lev. 38, S. C. Specot's case, 5 Rep. 58, b. 59, a. 2 Saund. 44, a, 45, note.

(*b*) *Vide ante*, p. 304. Booth, 74.

(*c*) *Vide ante*, p. 304. 2 Inst. 399.

(*d*) Co. Litt. 125, b. Br. Ab. Barre, 7.

(*e*) Br. Ab. Trial, 37, but see 2 Rol. Ab. 103, l. 35, *contra*, and Dyer, 6, a.

(*f*) Br. Ab. Trial, 37. Judgment, 22, 38. Co. Litt. 125, b. Doctr. Plac. 64, but see, 2 Rol. Ab. 103, l. 40, and Jenk. Cent. 11. that if the plea of the other tenant goes to the whole, the demandant cannot have execution.

(*g*) Br. Ab. Judgm. 38. Doctr. Plac. 64, but see Co. Litt. 125, b.

In general.

have judgment against the tenant, who has made default or confessed the action, because another tenant may perhaps appear and take the entire tenancy upon himself. (*a*)

In the above cases, the demandant after signing judgment may immediately issue execution, but there are other cases in which, although he is entitled to judgment immediately, it is yet with a *cesset executio*, until the trial of the issues joined with another defendant. Thus in a *quare impedit*, where the ordinary disclaims or pleads *ne disturba pas*, the plaintiff is entitled, as against him, to immediate judgment, and a writ may be awarded to the bishop, with a *cesset executio*, until the plea between the plaintiff and the other defendant is determined. (*b*)

In some cases also a sole tenant may plead a plea which shall entitle the demandant to judgment immediately, as where in dower *unde nihil habet*, the tenant pleads that he has been at all times ready to render dower, in this case the demandant is entitled to judgment immediately (*c*); and so if in a *curia claudenda*, the defendant plead *sufficient inclosure;* in *warrantia chartæ*, *nient implede;* in a writ of mesne, *not distrained in his default*, or in *admeasurement of pasture*, *ne surcharga pas:* in these cases the plaintiff is immediately entitled to judgment. (*d*)

In what cases it is necessary to issue a petit cape before judgment can be signed, has been already stated. (*e*)

The judgment for the demandant in a *præcipe quod reddat* in which land is demanded, is in general, that he recover seisin of the land, &c. and his damages, where damages are given by some particular statute. The form of the judgment in those real actions, in which there is any peculiarity, is more particularly stated in the following pages.

The effect of a judgment in a real action, is not to vest the freehold in the demandant until execution, and this holds with regard to common recoveries, upon which before execution sued no use can arise (*f*); but when the execution is executed, it relates back to the time of the judgment. (*g*)

But, though the judgment in a real action has not alone the

(*a*) Br. Ab. Gr. Cape, 1. *Ante*, p. 167.

(*b*) 2 Rol. Ab. 102, l. 38, 1 Brownl. 158, *ante*, p. 232, and *post*, in title "Execution."

(*c*) *Ante*, p. 224.

(*d*) Heath's maxims, 57.

(*e*) See *ante*, p. 282.

(*f*) Shelley's case, 1 Rep. 106, b. Moor, 141, S. C. Jenk. Cent. 249. 2 Inst. 523. Watk. on Desc. 18 (*note*), and see *ante*, p. 289, and *post*, in title "Execution."

(*g*) Hawkins v. Kemp, 3 East, 444, and see Lillingston's case, 7 Rep. 38, a.

effect of transferring the freehold, yet if land be recovered against one jointenant, who dies before execution, the survivor shall not avoid this recovery, for the moiety is bound by it. (*a*) In general.

The judgment ensues the nature of the thing demanded, and therefore in a real action brought by one jointenant, he cannot, as it seems, have judgment to hold the land in severalty (*b*), nor can one of two coparceners have judgment to hold his moiety in severalty. (*c*)

Where lands are recovered, upon which improvements have been made, if the recovery be against a wrong-doer, such improvements will belong to the demandant. (*d*) So if a man has a title to a *formedon* in reverter of an acre of land, and the tenant in tail builds a house upon the land, and dies without issue, the donor may, as it seems, demand so much land; and under such demand may recover the messuage. (*e*) And in dower, if the heir, by his industry, converts marsh into meadow, the wife will, it is said, be entitled to dower, according to the improved value; and so if the heir improves by building. (*f*) Whether the wife is entitled to improvements made by the feoffee of the husband, has been doubted (*g*); but it is said, that if the feoffee builds and takes down the building in the lifetime of the husband, the wife is only entitled to dower of the land as it was in the seisin of her husband. (*h*)

The judgment for the demandant in a writ of right is, that he recover his seisin, against the tenant, of the tenements, with the appurtenances, to hold to him and his heirs, quit of the tenant and his heirs for ever (*i*); for the tenant, that the demandant take nothing by his writ, but be in mercy for his false claim, and that the tenant go thereof without day; and also, that the tenant hold the tenements, with the appurtenances, to him and his heirs, quit of the demandant and his heirs. (*k*) In writ of right.

(*a*) Co. Litt. 185, a.

(*b*) Morrice's case, 6 Rep. 13, a; Co. Litt. 187, a. but see Br. Ab. Jointen. 43.

(*c*) Co. Litt. 167, b. Br. Ab. Judgm. 144.

(*d*) Perkins, s. 368. See Dyer, 47, a.

(*e*) *Per* four justices against three, Dyer, 47, a. See Goodtitle, d. Chester v. Alker, 1 Burr. 144, 145.

(*f*) Co. Litt. 32, a; but as to the latter point, see Pl. Quer. 46. Park. s. 328, *contra*.

(*g*) Co. Litt. 32, a. n. (3). Park on Dower, 257.

(*h*) Fitz. Ab. Dower, 192, Voucher, 188. Hale's note, Co. Litt. 32, a (3).

(*i*) Tyssen v. Clarke, 3 Wils. 563.

(*k*) 2 Town. Judgm. 115. Co. Litt. 295, b.

In writ of right.

In some cases, the judgment in a writ of right will be a final bar to the party against whom it is given, so as to preclude him from recovering the lands in another writ of right; or in any other action. On this account, such judgment is called a final judgment. The rule laid down by Fitzherbert, J. is, that judgment final shall not be given in a writ of right, but after the mise joined. (*a*) However, if the mise be joined upon the mere right, although the verdict of the grand assise be given upon another point, yet the judgment shall be final, as it shall also be if the tenant, after the mise joined, make default, or confess the action; or if the demandant be nonsuit. (*b*)

The tenant in a writ of right may have judgment as in case of a nonsuit; but cannot have costs. (*c*)

In *cessavit.*

The judgment in *cessavit*, on default of the tenant, is, that the demandant recover seisin of the land, with the appurtenances; but if the tenant tenders the arrearages, and finds sureties, as the court directs, the judgment is, that if the tenant afterwards cease, the land shall incur and remain to the demandant and his heirs, to hold in place of the services for ever. (*d*)

In *quo jure.*

In a writ of *quo jure*, the judgment for the plaintiff is, that he hold the lands to him and his heirs quit of the common claimed by the defendant. (*e*)

In *ne injuste vexes.*

The judgment in a writ of *ne injuste vexes* is, that the plaintiff hold to him and his heirs the lands, &c. of the defendant and his heirs, by the services, &c. (as the plaintiff alleges them,) quit and discharged of the rent, &c. (or services encroached). (*f*)

In a writ of mesne.

There are two different judgments in a writ of mesne; 1st, at common law, for the plaintiff to recover his acquittal, and, if damnified, his damages and costs; and, 2dly, under the statute of

(*a*) 26 H. 8, 8.

(*b*) Co. Litt. 295, b. Herne v. Lilburn, 1 Bulstr. 161; admitted in Chetham v. Sleigh, Carth. 47; but see Penryn's case, 5 Rep. 85, b. When a *petit cape* must issue before judgment, see 1 Bulstr. 161, *ante*, p. 282.

(*c*) Newman v. Goodman, 2 W. Black. 1093, 1110. Almgill v. Pierson, 1 Bos. and Pul. 103.

(*d*) Rast. Ent. 112, a. 2 Inst. 299. Kellw. 75, b. 2 Town. Judgm. 37.

(*e*) Rast. Ent. 589, b.

(*f*) See the form of judgment on a departure in despite of the court. Rast. Ent. 437, b.

Westminster (*a*), to have a forejudger of the mesnalty, either for not appearing at the grand distress, or after acquittal recovered, on a *distringas ad acquietandum*, against the same mesne. (*b*)

In a writ of mesne.

The judgment for the plaintiff in a *quod permittat*, varies according to the nature of the injury; and in effect is, that the nuisance complained of be abated, or the hindrance removed, and that the plaintiff recover his damages. Thus in a *quod permittat*, for not permitting the plaintiff to have a free passage over a water, the judgment is, that he have his free passage aforesaid. (*c*)

In *quod permittat*.

The judgment in dower for the demandant is, that she recover seisin of the third part of the tenements, &c.; and also damages and costs, in cases within the statute of Merton. (*d*) The judgment is, in general, to recover seisin of the tenements in demand, in severalty, by metes and bounds; but where the writ is brought against one of several tenants in common, it is error to say in severalty by metes and bounds. (*e*)

In dower.

By the statute of Merton, c. 1, the widow is entitled to damages if her husband die seised, from the death of her husband to the day on which she recovers seisin; and, therefore, after judgment and award of *hab. fac. seis.* she may suggest upon the roll, that her husband died seised, and have a writ of inquiry (*f*); and upon the return of the inquisition, there shall be judgment that the demandant recover the value of the lands, and her damages. (*g*) If the cause proceeds to trial, the jury who try the issue, may inquire of the value and damages (*h*); or the demandant may remit the value and damages, and have an *habere facias seisinam*, immediately. (*i*)

Where the tenant in a writ of dower vouches the heir of the baron, who enters into the warranty and pleads *riens per descent*, the demandant is entitled immediately to a conditional judgment, before the issue of *assets or not* is tried; but if the warranty is

(*a*) See *ante*, p. 39.
(*b*) Co. Litt. 100, a.
(*c*) Rast. Ent. 536, b. 2 Towns. Judgm. 194. Baten's case, 9 Rep. 55, a.
(*d*) 2 Towns. Judgm. 93; and see *ante*, p. 309.
(*e*) Clefold v. Car, 1 Brownl. 127. Co. Litt. 32, b.
(*f*) Aleworth v. Roberts, 1 Lev. 38. 1 Keble, 85, S. C. Clift's Ent. 302.
(*g*) Harvey v. Harvey, T. Ray. 256. 2 Town. Jud. 101.
(*h*) Com. Dig. Plead. (2 Y. 19.)
(*i*) 2 Town. Jud. 109. 1 Brown's Ent. 202. See further as to the damages in dower, *ante*, p. 309.

In dower.

denied by the heir, that issue must be tried before the demandant can have her dower. (*a*)

The judgment in dower, where nothing certain is demanded, does not entitle the demandant, before execution, to enter upon the tenements, or to distrain. She must wait until the sheriff deliver to her the third part in certainty. (*b*)

Where it appears, either from the plea of the tenant (*c*), or on receit of the termor (*d*), that there is a term in existence prior to the title of dower, a general judgment may be entered, upon which a special *hab. fac. seis.* is awarded, containing a clause that the termor shall not be expelled. (*e*) By this execution, if there be any rent reserved on the lease for years, the wife becomes entitled to it; the sheriff putting her into possession of the freehold, without disturbing the termor. (*f*) But if no rent be reserved, then judgment may be given with a *cesset executio*, during the term. (*g*)

In *formedon*.

The judgment in a writ of *formedon* is, that the demandant recover his seisin against the tenant, of the tenements demanded, with the appurtenances. (*h*)

In assise of *novel disseisin*.

The judgment for the plaintiff in an assise of *novel disseisin* (*i*) is, that he recover his seisin of the lands or office, which he demands, together with his damages and costs. Judgment may be given by the justices of assise (*k*); but if the assise be adjourned in bank, on account of difficulty, judgment may be given there. (*l*) If the justices of assise delay judgment, a writ shall go *de procedendo ad judicium*, and afterwards, an *alias* and *pluries, vel causam nobis significes*, and if nothing is done, an attachment. (*m*)

(*a*) Dyer, 202, b. 1st, Book of Judgm. 66. Jenk. Cent. 176, c. 52. Park on Dower, 299; and see in title "Voucher," *ante*, p. 272.

(*b*) Co. Litt, 34, b; and see *post*, in title "Execution," as to the *cesset executio*, in case of a term.

(*c*) *Ante*, p. 223.

(*d*) *Ante*, p. 289.

(*e*) Wheatley v. Best, Cro. Eliz. 564. Noy, 65, S. C.

(*f*) 1 Rol. Ab. 678, l. 15. Co. Litt. 32, a, Bodmyn v. Child, Com. Rep. 188.

(*g*) 1 Rol. Ab. 678, l. 20; or, as it seems, there may be the same judgment and execution as in the former case. Com. Rep. 188.

(*h*) Rast. Ent. 367, b. 1st Book of Judgm. 87.

(*i*) Lilly's Rep. 66.

(*k*) F. N. B. 248 F. Grange v. Denny, 3 Bulstr. 176.

(*l*) Com. Dig. Assise, (B. 26). Lucas v. Picroft, 2 Leon. 41.

(*m*) F. N. B. 248 D. F. Com. Dig. *ubi sup.*

In an assise of nuisance, the plaintiff may have judgment both to abate the nuisance and for his damages. (*a*) In assise of nuisance.

In a writ of entry *sur disseisin*, the judgment for the demandant is, that he recover against the tenant his seisin of the tenements with the appurtenances, and in cases within the statute of Gloucester, c. 1, his damages. And in a writ of entry for rent, that he recover his seisin of the rent with the appurtenances. (*b*) Upon issue tried, the jury at the trial of course assess the damages; but where judgment goes by default, a writ of inquiry must issue (*c*); or the demandant must release the damages. In writs of entry.

The judgment is, in general, the same in the other writs of entry.

The judgment for the plaintiff in a *quare impedit* is, that he recover his presentation, and have a writ to the bishop to admit his clerk, with damages, where damages are recoverable. At common law the judgment was only that the plaintiff recover his presentation, and have a writ to the bishop, and he may therefore if he pleases relinquish the damages given by the stat. of West. 2. (*d*) In *quare impedit*.

The judgment for the plaintiff is either upon default, demurrer, by confession, or upon verdict.

By the statute of Marlbridge, 52 Hen. 3, c. 12, the plaintiff may have judgment and a writ to the bishop if the tenant do not appear at the return of the grand distress, and it is said not to be necessary for the plaintiff to suggest a title (*e*), but it is safer to do so; and if one defendant makes default, and a writ to the bishop issues for the plaintiff, and another defendant pleads in bar, and it is found for him, he also may have a writ to the bishop, and the plaintiff's and defendant's clerks being both admitted, instituted, and inducted, shall try their rights in trespass, ejectment, or assise. (*f*) Although it is not given by the statute For the plaintiff on default.

(*a*) Baten's case, 9 Rep. 55, a.
(*b*) Rast. Ent. 281, a. 2 Towns. Judgm. 132.
(*c*) Pilfold's case, 10 Rep. 117, a. Rast. Ent. 281, a; and see title "Damages."
(*d*) Specot's case, 5 Rep. 59, a.
(*e*) 2 Inst. 125. F. N. B. 38 N. Jenk. Cent. 95; but see *contra*, Colt and Glover's case, Hob. 163. Watson v. Archbp. Cant. Dyer, 241, b. Moor, 81, S. C. R. v. Bishop of Lond. Salk. 559. 2 Mal. *qu. imp.* 82.
(*f*) 2 Inst. 125. Jenk. Cent. 95. Wats. Clerg. Law, 287. Barker v. Bp. of Lond. 1 H. Bl. 417.

In *quare impedit.* of Marlbridge, yet the plaintiff may have a writ of inquiry to ascertain the damages under this judgment (*a*), and the writ to the bishop ought not to issue till the writ of inquiry is returned. (*b*) So upon any other default, as upon a departure in despite of the court, the plaintiff is entitled to judgment and a writ to the bishop and damages (*c*), and may either remit the damages or pray a writ of inquiry. If judgment be given against one defendant by *nihil dicit*, no writ shall go to the bishop until the plaintiff has judgment also against the other defendant. (*d*)

For the plaintiff.

On demurrer. So where the judgment is given for the plaintiff upon demurrer, he may have a writ to the bishop, and also a writ of inquiry. (*e*)

On confession. The judgment for the plaintiff by confession is also that he recover his presentation and have a writ to the bishop, but no amercement is entered if the defendant appeared the first day of the summons. (*f*) The disclaimer of the ordinary or clerk operates as a confession, and entitles the plaintiff, as it has been already shewn, to judgment and a writ to the bishop, but in that case there is no judgment given for damages. (*g*)

On verdict or default at *nisi prius.* Judgment for the plaintiff upon verdict or default at *nisi prius*, may be given by the justices of assise by the statute of West. 2, c. 30, and a writ may be awarded to the bishop; and if judgment be not given at *nisi prius*, it may be given on the return of the *postea* in the superior court. (*h*) Where the verdict is found for the plaintiff the jury is bound *ex officio* to inquire into four points, viz. 1. Whether the church is full. 2. Of whose presentation. 3. The value of the church. 4. How long vacant. These points are inquired into for the purpose of ascertaining the damages given by the statute of West. 2. (*i*) The entry of the finding of the jury immediately precedes the judgment. (*k*) If the jury omits to inquire the points, the omission may be supplied by a writ of inquiry. (*l*)

Where there are several defendants in *quare impedit* who

(*a*) 2 Inst. 125. Mall. Q. *I.* 147.

(*b*) Bp. of Gloucester v. Veal, Noy, 66.

(*c*) 2 Mal. Quar. *Imp.* 83. *non sum informatus.* Rast. Ent. 522, a. *nil dicit.* Winch, 858.

(*d*) Wms. Clerg. Law, 287.

(*e*) Com. Dig. Pleader, (3 I. 11). 2 Mal. Qu. *Imp.* 96. 2 Towns. Judg. 180.

(*f*) Rast. Ent. 530, b.

(*g*) See *ante*, p. 232.

(*h*) Stat. of York, 12 Ed. 2, stat. 1. c. 4. 14 Ed. 3, stat. 1, c. 16. 13 Ed. 1. c. 30. 2 Inst. 424. Dyer, 135, a. 260, a. Sherley v. Underhill, Hob. 337.

(*i*) Kelw. 57, b. and see title "Damages," p. 315.

(*k*) 2 Towns. Judg. 184.

(*l*) 2 Towns. Judg. 192. Com. Dig. Plead. (3 I. 11).

plead several pleas in bar, and the issue joined on one of the pleas is found for the plaintiff, the latter cannot have judgment until the other issues are tried. (*a*) In *quare impedit.*

Where judgment is given for the defendant upon a plea in abatement, demurrer, discontinuance, nonsuit, or verdict, he is in general entitled to a writ to the bishop upon making title. For defendants.

If the writ be abated merely for want of form, which is supposed to be the fault of the clerk, as for misnomer, the defendant is not entitled to a writ to the bishop, but if the writ be abated by the plaintiff's own act, as if he be made a knight pending the suit, in that case the defendant may have a writ to the bishop (*b*), and so if it be abated, because one of the defendants was dead before the writ purchased. On plea in abatement.

Upon demurrer, the defendant may have judgment and a writ to the bishop without making title, if his title sufficiently appears in the plaintiff's count (*c*), otherwise it seems proper to make a formal title. On demurrer.

And where judgment is given for the defendant upon a discontinuance, he may have a writ to the bishop, after title made, and so upon nonsuit. (*d*) On discontinuance or nonsuit.

So also after title made on verdict. (*e*) On verdict.

Where the defendant is already parson imparsonee no writ to the bishop can be had, for it would be nugatory, as the defendant is already in possession (*f*), nor can he have it where he has not been served with the writ of *quare impedit* (*g*), nor can the patron have it if he makes default at the return of the *distringas*, although the plaintiff's writ is abated by the plea of the incumbent. (*h*) But although it appears on the plea of the clerk, that he has been instituted and inducted on the king's presentation, yet if this part of the plea is not true, a writ to the bishop may be awarded (*i*), and so in a *quare impedit* against a

(*a*) Jenk. Cent. 11. Wats. Clerg. Law, 287; and see Wallop v. Murray, 1 Brownl. 162.

(*b*) F. N. B. 38 H. M. Portman's case, 7 Rep. 27 b. Hale's notes, F. N. B. 38 (h). Wats. Cl. Law, 285. Danvers v. Bp. of Worc. Dyer, 42, b.

(*c*) 2 Rol. Ab. 387, l. 37. 1 Mal. Qu. Imp. 174. Wats. Cler. Law, 286.

(*d*) Portman's case, 7 Rep. 27, b. Hale's notes. F. N. B. 38, (h). Wats. Clerg. Law, 286. Colt v. Bp. of Cov. Hob. 163.

(*e*) Booth, 230.

(*f*) F. N. B. 38 L. Tufton v. Temple, Vaugh. 7.

(*g*) F. N. B. 38 O.

(*h*) F. N. B. 38 H.

(*i*) Winchcomb v. Pulleston, Hob. 193.

In *quare impedit.*

common patron and his clerk, if the patron makes title without confessing plenarty, and the clerk, on the other hand, pleads that he was inducted, &c. on the presentation of the patron, yet this plea shall not deprive the patron of his writ to the bishop. (*a*)

For the king.

Where the issue in a *quare impedit* brought by the king is, whether he is seised of the advowson of B., and the jury find that he is seised of two turns, and the bishop of the other turn, and it appears to be the king's turn, there shall be judgment for the king and a writ to the bishop, although the issue in fact is not proved (*b*), and so when the king's title appears upon record, though in a *quare impedit* between two strangers, a writ for the king shall be awarded (*c*); but though a title for the king appears upon the defendant's plea, yet there shall not be a writ for the admission of the king's clerk, without the plaintiff's confession of his title upon record (*d*), for the king's title must appear so clear *in allegatis et probatis* to the court, as to be certain and infallible against both the plaintiff and defendant. (*e*) If no title appears for the king upon the pleadings, but the jury wandering out of the issue find such title, no writ to the bishop can be awarded for the king upon this verdict (*f*), and the king's title must appear by record, and it is not sufficient if it appears only by the evidence. (*g*) When the king's title appears by record, the court ought *ex officio*, and without prayer, to award a writ to the bishop for the king. (*h*)

Though the writ will not abate by the death of the patron *pendente lite*, yet if judgment is given against such patron after his death it is error. (*i*) It seems that in such case judgment should only be given against the surviving defendants. (*k*)

In waste.

If a writ of waste be brought in the *tenuit*, judgment is given for damages only; if in the *tenet*, for the place wasted, and

(*a*) *Ibid.*
(*b*) R. v. Bp. of Roch. Hob. 118, 1 Brownl. 164, S. C.
(*c*) F. N. B. 38 E. Colt v. Bp. of Cov. Hob. 163. Wats. Clerg. Law, 288.
(*d*) Chancellor of Camb. v. Walgrave, Hob. 126.
(*e*) Colt v. Bp. of Cov. Hob. 163. Wats. Clerg. Law, 288.
(*f*) Norwood v. Denie's case, 1 Leon. 323.
(*g*) Chancellor, &c. of Cambridge, v. Bp. of Norwich, Moor, 872.
(*h*) Colt v. Bp. of Cov. Hob. 163. Yates v. Dryden, Cro. Car. 592.
(*i*) Pipe v. Regina, Cro. Eliz. 324.
(*k*) Wats. Clerg. Law, 266.

In waste.

also for treble damages by the statute of Gloucester, 6 Ed. 1, c. 5. (*a*)

On default at the *distringas*.

Judgment for the plaintiff may be given by statute Westminster 2, c. 14, if the tenant make default at the return of the *distringas*, in which case the sheriff, taking with him twelve, &c. shall go to the place wasted, and shall inquire of the waste done, and upon the inquisition returned, judgment shall be given. (*b*) The judgment in this case is, that the plaintiff recover seisin against the defendant, of the place wasted, by the view of the jurors, and his treble damages according to the statute. (*c*) Although the processes are returned *nihil*, so that possibly the defendant was never summoned or the writ served, yet upon a default on the *distringas* a writ of inquiry shall issue, but the defendant may if he chuses attend at the inquiry, and the jury may find against the plaintiff. (*d*) The sheriff must go in proper person to the place wasted with the jurors and view the same, for under this statute he is in the nature of a judge. (*e*) If the defendant appears upon the *distringas* and pleads, there can be no inquiry of waste under the statute. (*f*) It should be observed, that the plaintiff, in case of a default of the defendant at the return of the *distringas*, cannot release the damages and take judgment without a writ of inquiry. It seems that the parties may challenge the jurors on a writ of inquiry under the statute. (*g*)

By *nihil dicit* confession, &c.

Where the plaintiff obtains judgment upon a *nihil dicit*, *non sum informatus*, by confession, or upon demurrer, the writ of inquiry only issues to inquire of the damages, and not of the waste done, which is confessed, and therefore in such cases, if the plaintiff pleases, he may release the damages and take judgment and execution immediately. (*h*) The writ of inquiry in these cases should not be to inquire of the waste done, but of the damages merely, though if it be to inquire of the waste done, it is only surplusage and not error (*i*), and so if the sheriff is directed to go to the place wasted in person, notwithstanding such direction the she-

(*a*) Com. Dig. Pleader, (3 O, 22). Bacon's Ab. Waste, (M). 2 Inst. 304. 1st. Book of Judgm. 191.

(*b*) 2 Inst. 389. Com. Dig. Pleader, (3 O, 1). Vin. Ab. Waste, (N. a) (O. a). *Ante*, p. 154.

(*c*) Co. Ent. 697, a.

(*d*) 2 Inst. 389. Br. Ab. Waste, 68.

(*e*) 2 Inst. 390. Dyer, 204, a. Crocker v. Dormer, Poph. 24. Cro. Eliz. 290.

(*f*) 2 Inst. 390.

(*g*) Co. Litt. 158, b, and note (5).

(*h*) Topping or Tipping v. King, Hutt. 44. Winch, 7. Foster v. Spooner, Cro Eliz. 18. Darell v. Wyborne, Dyer, 204, a. Vin. Ab. Waste, (N. a).

(*i*) Warneford v. Haddock, Cro. Eliz. 290.

In waste.

riff may inquire of the damages at any place within his bailiwick. (*a*) The jury may find entire damages for waste assigned in several tenements (*b*), and if the jury consist of more than twelve it is not error. (*c*)

On verdict.

Upon verdict the judgment for the plaintiff is either that he recover the place wasted and treble damages, or his treble damages only, accordingly as the action is in the *tenet* or the *tenuit*. (*d*).

Petty damages.

If the jury find a verdict for the plaintiff and give damages under 40*d*. it seems that judgment shall be given for the defendant (*e*); and if in such case judgment be given for the plaintiff, it is erroneous. It has however been held that cutting trees to the value of 3*s*. 4*d*. is waste, and that several particular wastes, each of small value, may be so united as to form a large sum sufficient to maintain the action; as where damage is found in one house to the value of 20*d*. in another to the value of 12*d*. and in another to the value of 12*d*.; by adding these together the plaintiff will be entitled to judgment. (*f*)

In partition.

There are two judgments in the action of partition; first, *quod partitio fiat*, and, secondly, *quod partitio prædicta firma et stabilis in perpetuum teneatur*. (*g*) Upon the first of these, which is an interlocutory judgment, a writ issues to the sheriff, commanding him to make partition, and to cause the parties to hold their shares in severalty. (*h*) Upon this writ the sheriff was formerly obliged to attend at the lands in person (*i*), but now by 8 & 9 Wil. 3, c. 31, s. 4, if the sheriff, by reason of distance, infirmity, or other hindrance, cannot conveniently be present, the under sheriff in the presence of two county justices of the peace, may proceed to execute the writ of partition, and the high sheriff is to make the same return as if he had been personally present. By section five, the sheriff or under sheriff, and justices,

(*a*) Crocker v. Dormer, Poph. 94. Darell v. Wyborne, Dyer, 204, a.

(*b*) King v. Fitch, Cro. Car. 414.

(*c*) *Ibid.*

(*d*) Co. Ent. 706, a, 700, b.

(*e*) Br. Ab. Waste, 123. Co. Litt. 54, a. 2 Inst. 306. Finch's Law, l. 1, c. 3, s. 4. 2 Rol. Ab. 824 L. Vin. Ab. Waste, N. King v. Fitch, Cro. Car. 414. Keepers of Harrow school v. Alderton, 2 Bos. & Pul. 86. 2 Saund. 250, note (6). Bul. N. P. 120.

(*f*) Co. Litt. 54, a. 2 Rol. Ab. 824, (L). Br. Ab. Waste, 70.

(*g*) Co. Litt. 167, 168, a. 2 Towns. Judgm. 464. Com. Dig. Pleader, (3 F. 4). Allnatt on Partition, 70.

(*h*) Co. Litt. 167, b. Booth, 245. 10 Wentw. 153.

(*i*) Litt. s. 246.

In partition.

are required to attend, under a penalty of 5*l*. Under this writ the sheriff summons a jury of twelve men, and gives notice to the parties interested (*a*) to attend the execution of it, and then in their presence, *si interesse voluerint*, on the oath of the jurors divides the lands into equal parts according to their value, and delivers one part to each parcener in severalty. (*b*) If a manor is to be divided, and it lies intermixed with other lands, so that the jurors do not know the limits, quantity, &c. of the tenements to be divided, and the owner of the lands intermixed will not shew the certainty of his lands, yet the jury must make partition as well as they can. (*c*)

On the return of this writ under the seals of the sheriff and the jurors (*d*), final judgment is given *that the partition aforesaid be holden firm and effectual for ever* (*e*), and before this judgment is given no writ of error lies. (*f*) By the statute of William 3, this judgment, when entered after default according to the provisions of that act (*g*), shall be good, and conclude all persons whatsoever after notice as aforesaid, whatever right or title they have or may at any time claim to have, although all persons concerned are not named in the proceedings, nor the title of the tenant truly set forth. Provided that if any person within a year after judgment, or if infant, covert, nonsane, or out of the realm, within a year after disability removed, by motion, shew a probable bar, or that the plaintiff had not title to so much as he recovered, the court may admit him to plead, &c. or if he shews an inequality may award a new partition. By sec. 5, the tenants of any parts of the lands divided shall remain tenants after the partition on the same conditions, &c.

In *warrantia chartæ*.

When judgment is obtained in a *warrantia chartæ*, it binds the land of the warrantor which he had at the time of the writ purchased (*h*), and on this account it was often advisable to bring the action before the plaintiff was actually impleaded, in

(*a*) Or if the proceeding be under the 8 & 9 W. 3, c. 31, eight days notice to the Occupier or Tenant or Tenants, must be given. See *ante*, p. 131.

(*b*) Co. Litt. 167, b, 168, a.

(*c*) Temple v. Cooke, Dyer, 265, b.

(*d*) Litt. s. 249. 10 Wentw. 134, the sheriff's return may be amended; Baker v. Daniel, 6 Taunt. 193.

(*e*) Co. Litt. 168, a. 10 Went. 155.

(*f*) Ld. Barkley v. Lady Warwick, Cro. Eliz. 635. Moor, 643, S. C. Co. Litt. 168, a.

(*g*) See *ante*, p. 131.

(*h*) F. N. B. 134. K. Com. Dig. Pleader, (3 N. 5).

In *warrantia chartæ.*

which case it was said to be brought *quia timet.* (*a*) The judgment therefore differs when the action is brought *quia timet,* and when it is brought after a loss actually sustained. In a *warrantia chartæ quia timet,* the judgment is that the defendant warrant to the plaintiff the tenements, &c. *pro loco et tempore,* and no judgment for damages is given. (*b*) By this special judgment the lands are bound, though aliened by the warrantor after the purchase of the writ. (*c*)

Where a loss has been actually sustained, the judgment is, that the plaintiff recover his warranty and damages, and this not only where in the principal action damages have been recovered, as in assise, but where the land only has been recovered, as in a formedon. (*d*)

In *curia claudenda.*

The judgment in *curia claudenda* is to recover the enclosure and damages for the non enclosure. (*e*)

In deceit.

The judgment in a writ of deceit for non summons in a real action, is, that the plaintiff have seisin of his lands again, together with the issues, and that he be restored to all that he has lost, and that the demandant in the former action and the sheriff be taken, &c. (*f*)

In deceit for impleading lands in ancient demesne in the king's courts, the judgment is "that the plaintiff have his court again, to wit, that the tenements aforesaid, with the appurtenances, be impleaded in the same court and brought back, and be within the jurisdiction of that court, notwithstanding the judgment aforesaid had upon the said (writ of entry *sur disseisin* in the *post*) in the court of our lord the king here had, and that the said plaintiff be restored to all things which he has lost by occasion of the said judgment given upon the said writ of entry *sur disseisin* in the *post*" (*g*), and a *remittitur* of the damages is usually entered. In the entry in Rastal there is a *curia advisari vult,* as to the annulling of the former judgment.

(*a*) See *ante,* p. 142.
(*b*) Rast. Ent. 397, a. Br. Ab. War. Ca. 13. Roll v. Osborn, Hob. 23. *Ante,* p. 142.
(*c*) Br. Ab. War. Car. 8.
(*d*) Roll v. Osborn, Hob. 23.
(*e*) Br. Ab. Barre, 111.
(*f*) 2 Towns. Judgm. 91. Rast. Ent. 221, b. 1 Rol. Ab. 623, K. L. Booth, 252, see *ante* as to damages.
(*g*) Rast. Ent. 100, b, and see 2 Towns. Judgm. 91. *Ante,* p. 141.

Of Execution.

THE execution in most real actions is executed by a writ of *habere facias seisinam*, which directs the sheriff to cause the demandant to have seisin of the lands which he has recovered. Under this writ the sheriff may deliver seisin in the same manner as he delivers possession upon a recovery in ejectment.

By entry.

The demandant may, if he pleases, before seisin delivered on the *hab. fac. seis.* make an entry upon the lands recovered, when the writ shews the certainty of the thing recovered (*a*), and this entry will execute the judgment and vest the freehold in the demandant. But where the certainty of the lands demanded does not appear, as in dower, the demandant cannot enter, but must sue out an *hab. fac. seisinam*, and this even where the delivery of seisin by the sheriff will not reduce the demand to a certainty, as where in dower a woman recovers against one of two tenants in common, the third part of a moiety. (*b*) If the action be for recovery of a rent, common, &c. in certainty, the demandant after judgment may distrain, &c. without issuing a writ of execution. (*c*) The demandant may enter within or after the year after judgment (*d*), and if the tenant dies before execution, the demandant may enter upon his heir (*e*), though there have been several descents cast in the blood of the tenant (*f*); and so if before execution a stranger enters and dies seised, the demandant may enter within a year after judgment. (*g*) If a writ of error be brought against the heir, and judgment reversed, the demandant in error may enter upon him though he be in by descent. (*h*)

By *hab. fac. seisinam.*

Upon a judgment, that the demandant recover his seisin in a real action, he may take out execution at any time within a year,

(*a*) Co. Litt. 34, b. Com. Dig. Execution, (A. 1).
(*b*) Co. Litt. 34, b.
(*c*) Co. Litt. 34, b. Com. Dig. Execution, (A. 1).
(*d*) 1 Rol. Ab. 885, l. 10.
(*e*) 1 Rol. Ab. 884, l. 47. Co. Litt. 238, a.
(*f*) 1 Rol. Ab. 884, l. 52.
(*g*) 1 Rol. Ab. 885, l. 2. 12. Com. Dig. Execution, (A. 1).
(*h*) 1 Rol. Ab. 884, l. 42.

By *habere facias seisinam.*

and a day, after judgment by *habere facias seisinam*, and if the tenant die after judgment, execution may be sued against his heir, and so against the issue in tail, whether the recovery be upon a real title (*a*), or by common recovery. (*b*) If the demandant dies, his heir shall sue execution. (*c*) If baron and feme recover damages in a real action, they may sue execution jointly. (*d*)

If the writ be to deliver seisin of several messuages in the possession of the same person, it is sufficient if the sheriff does execution in one, in the name of all, without going to each in particular (*e*), but where the houses, &c. recovered are in the possession of several, it is not sufficient to deliver seisin of one in the name of all, but the sheriff ought to go to each in particular. (*f*) If the writ be for seisin in twenty acres, he ought to deliver seisin of twenty acres according to the computation of the country, and not twenty statute acres. (*g*) Upon an *hab. fac. seis.* in dower, if the sheriff offer to deliver seisin and shew in certainty the parcels which make the third part by metes and bounds, in severalty, the demandant, though she refuse such seisin, may afterwards enter. (*h*) In dower, on an *hab. fac. seis.* against several purchasers, the court will order the sheriff to charge the purchasers proportionably. (*i*) If the demandant has once had execution, he cannot afterwards have execution again, and therefore where the sheriff returns upon an *hab. fac. seis.* execution done, an *alias hab. fac. seis.* cannot issue. (*k*) So if a fee be executed in the ancestor, it shall never be executed again by the heir (*l*), or a fee tail by the issue in tail. (*m*) Under an *hab. fac. seis.* the sheriff may break into a house to deliver seisin. (*n*)

Scire facias.

If a year elapse after the judgment, the demandant cannot sue out an *hab. fac. seis.* without a *scire facias* (*o*), which lay at com-

(*a*) Com. Dig. Execution, (A. 2).
(*b*) Shelly's case, 1 Rep. 106, a. Co. Litt. 361, b. Dyer, 376, b.
(*c*) Com. Dig. Execution, (E).
(*d*) 1 Rol. Ab. 342, l. 33.
(*e*) 1 Rol. Ab. 886, l. 32. Com. Dig. Execution, (A. 3). Floyd v. Bethill, 1 Rol. Rep. 421. The tenants should be turned out, Gilb. Eject. 108, (2nd edit.). Upton & Wells, 1 Leon. 145.
(*f*) 1 Rol. Ab. 886, l. 36.
(*g*) Backman v. Maplesden, Bridgm. Judgm. 68. 1 Rol. Ab. 886, l. 50. Floyd v. Bethill, 1 Rol. Rep. 420. Com. Dig. Execution, (A. 3). But see Dyer, 47, b. (margin) *contra.*
(*h*) Dyer, 278, b.
(*i*) 1 Freeman, 227.
(*k*) Com. Dig. Execution, (A. 3). Dyer, 278, b.
(*l*) 1 Rol. Ab. 886, l. 18.
(*m*) 1 Rol. Ab. 886, l. 20.
(*n*) Semayne's case, 5 Rep. 91, b.
(*o*) Com. Dig. Execution, (A. 4). Pleader, (3 L. 1).

mon law in real actions (*a*); but where the entry of the demandant is congeable, he may enter without a *scire facias*. (*b*) *Scire facias.*

The mode of executing the judgment in a writ of *quare impedit* is so peculiar as to require a more particular notice. *In quare impedit.*

The execution in *quare impedit* for the recovery of the presentation, is by writ to the bishop to admit the clerk, and by *fi. fa.* or *elegit*, when the plaintiff is entitled to damages; but no costs are recoverable in this action. (*c*) When the church is vacant, the plaintiff and defendant, being both actors, may either of them have a writ to the bishop; but in case the clerk of the party for whom judgment is given, be already admitted and instituted, a writ to the bishop is unnecessary. The several cases in which the plaintiff or defendant is entitled to a writ to the bishop, have been already stated. (*d*) The bishop may, if he pleases, admit and institute the clerk of the party entitled to a writ *ad admittendum clericum*, without any writ being actually sued out. (*e*)

If the bishop, who is made a defendant, claims only as ordinary, and does not make himself a disturber by pleading to the title, the writ to admit a clerk may be directed to him, or to the metropolitan of the province, at the election of the party recovering the presentation; but if the bishop make title to present, or if the judgment be given upon *non sum informatus* or *nihil dicit*, the writ must, it is said, be directed to the archbishop and not to the ordinary. (*f*) If the bishop be absent, or the see vacant, the writ must be directed to the guardian of the spiritualties (*g*), and if the Archbishop of Canterbury be plaintiff, it must be directed to the Archbishop of York. (*h*) In a *quare impedit* brought in Wales, the justices of grand sessions may award a writ to the Archbishop of Canterbury. (*i*) If the bishop refuse to admit, an

(*a*) 2 Inst. 469. Gilb. Eject. 102, (2nd edit.).

(*b*) Dyer, 376, b, margin.

(*c*) Com. Dig. Pleader, 3 I. 11, 12. 1 Brownl. 158, and see *ante*, p. 321.

(*d*) See *ante*, p. 333.

(*e*) Wats. Clerg. Law, 296. Rud v. Bp. of Lincoln, Hutt. 66. Hall's case, Hetl. 130.

(*f*) 1 Brownl. 159. 2 Rol. Ab. 587, l. 27. 1 Mall. *qu. imp.* 178. Com. Dig. Pleader, (3 I. 12). Wats. Clerg. Law, 296. Same law as to certificate by ordinary. Com. Dig. Certific, (A. 5); but, in Grange v. Denny, 3 Buls. 175, the court held, "that the writ might be directed to the bishop though a disturber." And see F. N. B. 38 B.

(*g*) Dyer, 77, a, 350, a.

(*h*) Per Holt, R. v. Warrington, 1 Shower, 329.

(*i*) Lort v. Bp. of St. David's, W. Jones, 332. Cro. Car. 342, S. C.

In *quare impedit.*

alias, pluries and attachment may issue against him (*a*), and the ordinary may be fined for a bad return (*b*), or the plaintiff may have a *quare non admisit* and recover damages. (*c*) Where a person recovers a benefice, that is a donative, the writ goes to him that ought to instal or induct, or to the sheriff, to put the clerk into possession. (*d*) If the writ is awarded to the wrong ordinary, it is only error in the execution of the judgment, and for this error alone the writ of error ought to be brought, and the judgment shall not be reversed, but only *quoad* the awarding of the writ. (*e*)

The usual return by the ordinary is, that he has admitted the clerk (*f*), but he may return as matter of excuse, that the clerk did not request to be admitted (*g*), or that he is not a fit person, shewing how. (*h*)

The duty of the ordinary upon receiving the writ is to admit the clerk of the party recovering, and to remove the clerk of the party against whom judgment is given, provided such clerk has been made a defendant (*i*), or has been admitted *pendente lite.* There is however no formal removal of the former clerk, but the bishop admits and institutes the clerk of the party recovering, which operates as a removal of the other incumbent, who is indeed said to be *debito modo amotus*, after judgment given in the *quare impedit.* (*k*) The books differ upon the point, whether the bishop is bound to admit the clerk, when the clerk of a stranger has been presented, admitted, and instituted, *pendente lite.* (*l*) It appears however, that if the second clerk comes in under the title which has been disproved by the party entitled to the writ to the bishop, he may be removed. (*m*) The ordinary

(*a*) F. N. B. 38 C, 47 C.

(*b*) Moor v. Bishop of Norwich, 3 Leon. 139.

(*c*) F. N. B. 47 C.

(*d*) F. N. B. 48 A. Wats. Clerg. Law, 298.

(*e*) P. Coke, in Grange and Denny's case, 3 Buls. 178. Wats. Clerg. Law, 298.

(*f*) 2 Towns. Jud. 192.

(*g*) Keilw. 71, b.

(*h*) Semb. Dyer, 254, b. Com. Dig. Pleader, (3 I. 12).

(*i*) Elvis v. Abp. of York, Hob. 320. Co. Litt. 344, b. 1 Mal. qu. *imp.* 181. Wats. Clerg. Law, 289.

(*k*) Harris v. Austen, 3 Buls. 38. Wats. Clerg. Law, 295.

(*l*) The authorities that the bishop must remove the stranger's clerk, are Boswell's case, 6 Rep. 51, b. Elvis v. Abp. of York, Hob. 320. Sir J. Hall's case, Hetl. 130, 131. That the bishop is not bound to remove the stranger's clerk, F. N. B. 47 K. Basset v. Stafford, Dyer, 260, a. Lancaster v. Lowe, Cro. Jac. 93. Hall v. Broad, Sid. 94. Booth, 230.

(*m*) Harris and Austen's case, 1 Rol. Rep. 213. Beverley and Cornwall's case, Goulds. 105. Wats. Clerg. Law, 291.

In *quare impedit.*

may be prevented from admitting the clerk of a stranger pending the suit, by a *ne admittas*, after which, if he admits the clerk of another, pending the suit, and the plaintiff recovers, the latter may have a *quare incumbravit*, and remove any one who comes in, pending the writ, by whatsoever title, and force the party entitled, to recover by *quare impedit*. (*a*) If the clerk of a stranger has been presented, and admitted *pendente lite*, and the bishop makes his return accordingly, the proper course appears to be to issue a *scire facias* against the former and present incumbent, and a *quare non admisit* against the ordinary. (*b*) But if the bishop, instead of making his return that the church is full of a stranger's clerk, admits and institutes the clerk of the party recovering, and he is inducted, the two incumbents must then try their titles in a possessory action at common law (*c*), and it is said to be advisable for the bishop in such case to admit and institute the second clerk. (*d*)

If the writ to the bishop be awarded by the justices of *nisi prius*, it is not made returnable, but if the record be removed into C. P. and an alias issued, that writ is made returnable in C. P. (*e*)

(*a*) Lancaster v. Lowe, Cro. Jac. 93. F. N. B. 48 H.

(*b*) Basset v. Stafford, Dyer, 260, a. Lancaster v. Lowe, Cro. Jac. 93.

(*c*) Bennet v. Edwards, Moor, 572. Hall's case, Hetley, 131.

(*d*) Wats. Clerg. Law, 302.

(*e*) 2 Inst. 424. Dyer, 260, a.

Of Error.

By whom.

IT is a general rule, that no person can bring a writ of error who is not a party, or privy to the record, or who is not injured by the judgment; and so to receive advantage by the reversal of it (*a*); therefore, in real actions, error and attaint always descend to the person to whom the land would descend, if there had never been such recovery, or false oath. (*b*) Thus, if there be an erroneous judgment against tenant in tail female, the issue female, and not the son, shall bring a writ of error. (*c*) So the younger son, when entitled to the land by the custom of Borough English, shall have error, and not the heir at common law. (*d*) If, pending a real action, the tenant aliens in fee, and afterwards a recovery is had against him, he may yet have a writ of error, though he has nothing in the land, because he is privy to the judgment after his alienation, and remains tenant in law to the demandant; and when he is restored, the alienee shall enter upon him. (*e*) But the alienee cannot have a writ of error for want of privity. (*f*)

Reversioner and remainderman.

At common law, the reversioner, or remainderman, may have error after the death of tenant for life, on a judgment against tenant for life, although not made a party by aid-prayer, voucher, or receit (*g*); but if made a party to the record by such means, he may maintain a writ of error during the life of tenant for life. (*h*) So he in remainder or reversion, after an estate tail, may have a writ of error after the determination of the entail. (*i*) By 9 R. 2, c. 3, s. 1, if tenant for life, in dower, by the curtesy,

(*a*) 1 Rol. Ab. 747, l. 33. Bac. Ab. Error, (B). 2 Saund. 46, a, note, 5th edit.

(*b*) Henningham v. Windham, 1 Leon. 261. Owen, 68, S. C. 1 Rol. Ab. 747, l. 29.

(*c*) *Ibid.*

(*d*) *Ibid.*

(*e*) 1 Rol. Ab. 748, l. 32. Scroggs v. Ld. Mordaunt, Cro. Eliz. 294. Palm. 247, 254. Bac. Ab. Error, (B).

(*f*) 1 Rol. Ab. 748, l. 41.

(*g*) Winchester's case, 3 Rep. 3, b. Charnock v. Sherrington, Cro. Eliz. 289; and reversioner and tenant for life may have several writs of error. Jenk. Cent. 69. Vin. Ab. Error, (G. a. 3).

(*h*) Winchester's case, 3 Rep. 4, a.

(*i*) Winchester's case, 3 Rep. 3, b. Bac. Ab. Error, (B). Sheepshanks v. Lucas, 1 Burr. 410. 2 Saund. 46, a, note, 5th edit.

By whom.

or in tail after possibility, be impleaded, and lose by verdict or otherwise, he in reversion shall have an attaint, or writ of error, upon a false verdict found, or an erroneous judgment given against the particular tenant; and if the oath be found false, or the judgment erroneous, and the tenant is still in life, he shall be restored to his possession and issues, and the reversioner to the arrearages; but if he be dead, or found of covin with the demandant, the reversioner shall have all: yet the tenant may traverse the covin by *scire facias*, out of the judgment, or writ of attaint if he please. This statute extends to remainders, as well as reversions upon an estate for life; but does not include estates expectant upon an estate tail. (*a*)

Vouchee and tenant by receit.

A writ of error may be brought by a person who is made a party *pendente lite*, as by a vouchee, for he becomes tenant in law. (*b*) It seems, that the vouchee can assign errors which happened between the demandant and the tenant, as well as errors between the demandant and himself. (*c*) And so it is said, that the second vouchee may assign error between the demandant and the first vouchee. (*d*) But it seems, that the tenant cannot have a writ of error, for an error between the demandant and the vouchee. (*e*) Tenant by receit may assign errors between the demandant and tenant, and between the demandant and himself. (*f*) If a feme is received on the default of her baron, and loses the land by judgment, the baron and feme shall have a writ of error on such judgment. (*g*)

In general all the defendants against whom judgment has been given, must join in error: and, therefore, if, in a *quare impedit*, judgment be given against the incumbent and the bishop, although the bishop claim nothing but as ordinary, and so loses nothing, yet, being privy to the record, he may join in error. (*h*) But in a *præcipe quod reddat*, if the tenant disclaims, he shall never have a writ of error, because, by his disclaimer, he has

(*a*) Winchester's case, 3 Rep. 4, a, b. Jennings's case, 10 Rep. 44, b. Linc. Col. case, 3 Rep. 61, a.

(*b*) 1 Rol. Ab. 747, l. 38. Bac. Ab. Error, (B).

(*c*) F. N. B. 21 C. and note (*b*). 1 Rol. Ab. 755, l. 20; and see Viu. Ab. Error, (R).

(*d*) 1 Rol. Ab. 755, l. 25.

(*e*) 1 Rol. Ab. 747, l. 44. Jenk. Cent. 69; but see 1 Rol. Ab. 755, l. 24.

(*f*) F. N. B. 21 C; and if judgment be reversed, tenant for life shall be restored. Br. Ab. Error, 39.

(*g*) 1 Rol. Ab. 748, l. 9.

(*h*) Lancaster v. Lowe, Cro. Jac. 92. R. v. Bishop of Glouc. Cro. Eliz. 65. 3 Leon. 176, S. C. Hacket v. Herne, 3 Mod. 134. Bac. Ab. Error, (B).

By whom.

debarred himself of all right in the land (*a*): otherwise, where the tenant departs in despite of the court, or judgment is given upon his confession. (*b*)

In a real action, in which both land and damages are recoverable, if the tenant dies, and the heir, who in respect of the land ought to have a writ of error, releases all writs of error; yet the executor of the tenant may bring a writ of error, to avoid the judgment as to the damages. (*c*)

Against whom.

A writ of error does not lie against any but him who is party or privy to the first judgment, or his heirs (*d*); and, therefore, on a judgment for recovery of land, the writ must be brought against him who was party to the judgment, although he has nothing in the land, and not against the tenant; and on such writ, the judgment may be reversed; but there must be a *scire facias* against the terre-tenant. (*e*) Though this writ of *scire facias* is only discretionary, and not *stricti juris*, yet as the constant and uniform practice of the court has been to sue it out, it is not now to be departed from. (*f*) The terre-tenant, though he is not privy to the former judgment, may plead a release of errors. (*g*)

On what judgments it lies.

A writ of error does not lie until final judgment be given; and, therefore, in a writ of partition, if judgment be given *quod partitio fiat*, and a writ is directed to the sheriff to make partition, no writ of error lies, before the second judgment is given *quod partitio prædicta firma et stabilis in perpetuum teneatur*. (*h*)

But in those real actions in which damages have been given by statute, the judgment for the land, and the judgment for the damages, are separate and distinct, and error will lie on the first judgment, although no judgment for damages has been yet given. (*i*) Thus, in dower, if a woman recovers, a writ of error lies before the writ of inquiry for damages is awarded. (*k*) So

(*a*) Beecher's case, 8 Rep. 61, b. R. v. Bp. of Glouces. 3 Leon. 176.

(*b*) Beecher's case, 8 Rep. 62, a. F. N. B. 21 K.

(*c*) Williams v. Williams, Cro. Eliz. 558. See *ante*, p. 326.

(*d*) Br. Ab. Error, 9. 1 Rol. Ab. 749, l. 30. Bac. Ab. Error, (B).

(*e*) Br. Ab. Error, 9. 1 Rol. Ab. 749, l. 32. Bac. Ab. *ubi sup.*

(*f*) Earl of Pembroke's case, Carth. 112. Kingston v. Herbert, 3 Mod. 119. Hall v. Woodcock, 1 Burr. 359. Sheepshanks v. Lucas, *Ibid.* 412. 2 Saund. 72, o, 93, a, notes.

(*g*) 1 Rol. Ab. 766, l. 21. Hall v. Woodcock, 1 Burr. 362.

(*h*) Co. Litt. 168, a. 1 Rol. Ab. 750, l. 12. Lord Barkley v. Countess of Warwick, Cro. Eliz. 635, 643. Metcalf's case, 11 Rep. 40, a. *Ante*, p. 339.

(*i*) See *ante*, p. 326, and Dyer, 291, b, margin.

(*k*) 1 Rol. Ab. 750, l. 35.

in *quare impedit* (*a*), and in *darrein presentment.* (*b*) And the judgment for the damages may be reversed, while the judgment for the land shall stand good. (*c*) On what judgments it lies.

A writ of error does not lie until judgment is given against all the parties to the suit. Thus, if a *quare impedit* is brought against two, and one pleads to issue, and the other confesses the action, upon which confession judgment is given, the defendant against whom it is given cannot have a writ of error till the matter is determined as to the other. (*d*) So in a *formedon*, if the demandant has judgment for part, no writ of error lies, until the entire matter in demand is determined. (*e*) And so if the tenant is ousted of aid, error does not lie on such judgment, until the principal judgment is given. (*f*)

By the 16 and 17 Car. 2, c. 8, s. 3, made perpetual by the 22 and 23 Car. 2, c. 4, "No execution shall be stayed, by writ of error, or *supersedeas* thereupon, after verdict and judgment, in any action personal whatsoever, unless a recognizance with condition according to the statute, 3 Jac. 1, shall be first acknowledged in the court where such judgment shall be given; and further, that in writs of error to be brought upon any judgment after verdict, in any writ of dower, or in any action of *ejectione firmæ*, no execution shall be stayed, unless the plaintiff or plaintiffs in such writ of error shall be bound unto the plaintiff in such writ of dower, or action of *ejectione firmæ*, in such reasonable sum as the court to which such writ of error shall be directed shall think fit, with condition, that if the judgment shall be affirmed, or the writ of error discontinued, in default of the plaintiff or plaintiffs therein, or the said plaintiff or plaintiffs be nonsuited in such writ of error, that then the said plaintiff or plaintiffs shall pay such costs, damages, and sum and sums of money, as shall be awarded upon or after such judgment affirmed, discontinuance or nonsuit had." Bail in error.

And to the end that the same sum or sums and damages may be ascertained, it is further enacted, (sec. 4,) that, "the court wherein such execution ought to be granted, upon such affirmation, discontinuance, or nonsuit, shall issue a writ to inquire, as well of the mesne profits, as of the damages by any waste

(*a*) *Ibid.* l. 53. *Ante*, p. 326.
(*b*) *Ibid.* 749, l. 44.
(*c*) 1 Rol. Ab. 776, l. 4.
(*d*) Metcalf's case, 11 Rep. 39, a; and see Vin. Ab. Error, (M).
(*e*) Metcalf's case, 11 Rep. 39, b. Dyer, 291, b.
(*f*) Ld. Barkley v. Countess of Warwick, Cro. Eliz. 636.

Bail in error.

committed after the first judgment in dower, or in *ejectione firmæ;* and upon the return thereof, judgment shall be given and execution awarded, for such mesne profits and damages, and also for costs of suit." (*a*)

Reversal and restitution.

Upon the reversal of a judgment in a real action, the tenant shall be restored to the lands which he has lost (*b*); and if there be an erroneous judgment against tenant for life, and he and the reversioner bring several writs of error, judgment given for one of them, and execution, shall revest both estates. (*c*) So on the reversal of the judgment by the vouchee, or tenant by resceit, the terre-tenant shall be restored. (*d*) When the demandant recovers seisin, or possession of land, in any action by erroneous judgment, and afterwards the judgment is reversed, the plaintiff in the writ of error shall have a writ of restitution, reciting the first recovery, and the reversal of it in the writ of error, and directing the plaintiff in the writ of error, to be restored to his possession and seisin, together with the profits thereof from the time of the judgment, taken by the plaintiff below, by colour of the judgment. (*e*) It seems, however, that where the profits (which are uncertain) are to be recovered, a *scire facias* ought to issue. (*f*)

Entry after writ of error.

In a real action, after judgment, the demandant may enter, notwithstanding the writ of error, if his entry were lawful without the judgment, for such entry is not by force of the judgment, which shall not put him in a worse condition than he was in before. (*g*)

Certificate of assise.

The certificate of assise is a proceeding in the nature of a writ of error. At common law, if the matter be not well examined by the verdict before or after judgment, the justices of assise may, *ex officio*, re-examine the matter by the same recognitors (*h*); and, therefore, a writ goes to the sheriff to summon the recognitors *ad certificandum eos super articulis*, and that he

(*a*) For the decisions on this statute, see Tidd's Pr. 1212, 8th edit.; and *post*, in "Ejectment."

(*b*) 1 Rol. Ab. 805, l. 23.

(*c*) Jenk. Cent. 69. Vin. Ab. Error, (H. b). Stat. 9 R. 2, c. 3. *Ante*, p. 346.

(*d*) Br. Ab. Restitution, 6.

(*e*) Menvill's case, 13 Rep. 21. Vin. Ab. Error, (I. b). Sympson v. Juxon, Cro. Jac. 698.

(*f*) Sympson v. Jackson, Palm. 324; and see 2 Saund. 101 *a*, note.

(*g*) Badger v. Floid, 12 Mod. 398. Withers v. Harris, 2 Ld. Raym. 808.

(*h*) 2 Inst. 425. F. N. B. 181 A, B. C. Com. Dig. Assise, (B. 27). Booth, 216.

summon the parties *ad audiendum illam certificationem.* (*a*) A certificate lies upon an assise of *mortd'ancestor, darrein presentment,* or *juris utrum,* as well as upon an assise of *novel disseisin.* (*b*) A certificate is not allowed at common law, where the jury give a full general verdict, or where any of the recognitors have died. (*c*)

Certificate of assise.

By statute of Westminster 2, c. 25, a certificate of assise lies where the assise is taken by default or upon a plea by the bailiff, in which case, the party who is made defendant in the assise, may verify to the justices, that he has matter of record, or in writing, as a release, and pray that it may be re-examined (*d*); and this may be done before or after judgment. (*e*) The judgment is, that the defendant recover his seisin again, and double damages, and that the plaintiff be imprisoned at the discretion of the justices. (*f*)

(*a*) F. N. B. 181 F.
(*b*) F. N. B. 183 E.
(*c*) 2 Inst. 415.
(*d*) 2 Inst. 414, 415. F. N. B. 181 A, F. Com. Dig. Assise, (B. 28).
(*e*) F. N. B. 183 D.
(*f*) F. N. B. 182 A. See more as to certificate, under the statute, Com. Dig. *ut sup.* Booth, 289.

A

TREATISE

ON

THE LAW OF ACTIONS

RELATING TO

REAL PROPERTY:

COMPRISING THE FOLLOWING TITLES,

1. REAL ACTIONS.
2. ACTIONS ON THE CASE FOR NUISANCE AND DISTURBANCE.
3. ACTION ON THE CASE IN THE NATURE OF WASTE.
4. ACTION ON THE CASE FOR DILAPIDATIONS.
5. ACTION ON THE CASE FOR SLANDER OF TITLE.
6. ASSUMPSIT ON THE SALE OF REAL PROPERTY.
7. ASSUMPSIT FOR USE AND OCCUPATION.
8. COVENANT.
9. DEBT FOR RENT.
10. DEBT FOR USE AND OCCUPATION.
11. DEBT FOR DOUBLE VALUE.
12. DEBT FOR DOUBLE RENT.
13. EJECTMENT.
14. REPLEVIN.
15. TRESPASS QUARE CLAUSUM FREGIT.
16. TRESPASS FOR MESNE PROFITS.

IN TWO VOLUMES.

VOL. II.

By HENRY ROSCOE, Esq.

OF THE INNER TEMPLE.

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Action on the Case for Nuisance and Disturbance.

THE action on the case for nuisance, or the disturbance of a man in the enjoyment of corporeal or incorporeal hereditaments, has now entirely superseded the ancient remedies of assise of nuisance, and *quod permittat.* (*a*) In both those actions, as we have seen, there was a judgment to have the nuisance abated, but the effect of that judgment is gained in modern practice by bringing a second action, and giving larger damages, should the injury be continued. An action on the case may be maintained for a disturbance in the enjoyment of corporeal hereditaments, as houses or land, where the injury is not immediate and forcible; in which case, trespass lies. So it lies for injuries to incorporeal hereditaments, as commons, rights of way, pews, offices, franchises, &c., which are not susceptible of the forcible injury, which is the subject of an action of trespass.

Where the injury is originally a trespass, an action on the case cannot be maintained for the continuance of the trespass by the same person. (*b*)

For disturbance in the enjoyment of houses and land.

An action on the case lies for a nuisance to the habitation or estate of another (*c*); as if a man builds a house overhanging the house of another, whereby the rain falls upon the latter house (*d*); or if a man fixes a spout to his own house, from whence the rain falls into the yard of another, and hurts the foundation of his buildings. (*e*) So if a lessee overcharges his room with weight, whereby it falls on the cellar of the plaintiff

(*a*) See *ante*, pp. 40, 73.

(*b*) Coventry v. Stone, 2 Stark. N. P. C. 534; but see Lawrence v. Obee, 1 Stark. N. P. C. 22. See, also, Winterbourne v. Morgan, 11 East, 402. A continuation of every trespass is, in law, a new trespass. *Ibid.* 405.

(*c*) Baten's case, 9 Rep. 53, b. Com. Dig. Action on the case for nuisance, (A). So if the defendant's trees overhang the plaintiff's house. See Morrice v. Baker, 3 Bulstr. 198, *per* Croke, J. 1 Rol. Rep. 394; and see Pickering v. Rudd, 1 Stark. N. P. C. 56.

(*d*) *Ibid.* Penruddock's case, 5 Rep. 101, a. 2 Rol. Ab. 140, l. 51.

(*e*) Reynolds v. Clarke, Fort. 212.

For disturbance in the enjoyment of houses and land.

beneath. (*a*) So the erection of any thing offensive so near the house of another as to render it useless and unfit for habitation, is actionable. (*b*) As erecting a swine-stye, or lime-kiln (*c*); a privy, or tan-pit (*d*), a smith's forge (*e*), a tobacco-mill (*f*), a smelting-house (*g*), or the like. But an action will not lie for such things as merely abridge the gratification of a person in the enjoyment of his property, as shutting out the prospect from his windows (*h*); and where the plaintiff brought his action against the defendant for keeping his dogs so near the plaintiff's house, that his family were prevented from sleeping during the night, and were much disturbed during the day, and the jury found a verdict for the defendant, though no evidence was given by him, the court refused to grant a new trial. (*i*) Nor can an action be maintained for a reasonable use of a person's rights, though it be to the annoyance of another; as if a butcher, brewer, &c.; use his trade in a convenient place (*k*); or if a man sets up a school so near my study, who am of the profession of the law, that the noise interrupts my studies. (*l*) So an action for a nuisance to a house, cannot be maintained for that which was no nuisance, before a new window was opened by the plaintiff, and which becomes a nuisance only by that act. (*m*)

For stopping lights.

An action on the case also lies for stopping the ancient lights belonging to a house (*n*); or lights of which the owner of a house has had an adverse unexplained enjoyment for twenty years or upwards. (*o*) So if the owner of land builds a house on

(*a*) Edwards v. Halinder, 2 Leon. 93. Poph. 46, S. C.

(*b*) In an indictment for a nuisance, Lord Mansfield held, that it was not necessary that the smell should be unwholesome, it was enough if it rendered the enjoyment of life and property uncomfortable. R. v. White, 1 Burr. 337.

(*c*) Aldred's case, 9 Rep. 59, a. 2 Rol. Ab. 141, l. 13. See R. v. Wigg, 2 Salk. 460.

(*d*) Jones v. Powell, Hutt. 136. Palm. 536, S. C. Com. Dig. act. for nuisance, (A).

(*e*) Bradley v. Gill, Lutw. 70. Com. Dig. *ubi supr*

(*f*) Styan v. Hutchinson, MS. Selw. N. P. 1047, 4th edit.

(*g*) 1 Rol. Ab. 89, l. 15. Com. Dig. *ubi sup.*

(*h*) Aldred's case, 9 Rep. 58, b.

(*i*) Street v. Tugwell, MS. Selw. N. P. 1047, 4th edit.

(*k*) Com. Dig. action on the case for nuisance, (C).

(*l*) *Ibid.*

(*m*) Lawrence v. Obee, 3 Camp. N. P. C. 514.

(*n*) Aldred's case, 9 Rep. 58, a. Bowry v. Pope, 1 Leon. 168. 2 Rol. Ab. 140, l. 45.

(*o*) 2 Saund. 175, notes, 5th edit.; and see *post*, p. 371.

part of the land, and afterwards sells the house to one person, and the adjacent land to another, the vendee of the house may maintain an action against the vendee of the land, for obstructing his lights, although the house be a new house, because the law will not permit the vendor, and by consequence, any person claiming under him, to derogate from his own grant. (*a*) And so the occupier of one of two houses, built nearly at the same time, and purchased of the same proprietor, may maintain a special action on the case, against the tenant of the other, for obstructing his window lights by adding to his own building, however short the previous period of enjoyment by the plaintiff. (*b*) A custom for building upon a *new* foundation to the obstruction of ancient lights, has been held void. (*c*) But by the custom of London every citizen upon an *ancient* foundation, may build a house as high as he pleases. (*d*) No action will lie if the defendant merely prevents an excess in the plaintiff's use of his right (*e*); as if A. has lights in an ancient house, and rebuilds his house, and makes lights in other places and larger (*f*); but if an ancient window is enlarged, the owner of the adjoining land cannot lawfully obstruct the passage of the light to any part of the space occupied by the ancient window, although a greater portion of light be admitted through the unobstructed part of the enlarged window than was formerly enjoyed. (*g*) The opening of a window, whereby the plaintiff's privacy is disturbed, is not actionable; the only remedy is to build upon the adjoining land, opposite the offensive window. (*h*) So the building of a wall, which merely intercepts the prospect of another, without obstructing his lights, is not actionable. (*i*) It should be observed, that a total privation of light is not necessary to maintain this action. If the

For disturbance in the enjoyment of houses and land.

(*a*) Palmer v. Fletcher, 1 Lev. 122. 1 Sid. 167, S. C. Cox v. Mathews, 1 Vent. 237. Com. Dig. action on the case for nuisance, (A). Bull. N. P. 74.

(*b*) Compton v. Richards, 1 Price, 27.

(*c*) 1 Rol. Ab. 558, l. 46. Hughes v. Keme, Yelv. 216.

(*d*) *Ibid.* Com. Rep. 273. Com. Dig. London, (N. 5).

(*e*) Com. Dig. action on the case for nuisance, (C).

(*f*) *Ibid.* 2 Ver. 646.

(*g*) Chandler v. Thompson, 3 Camp. N. P. C. 80. Martin v. Goble, 1 Camp. N. P. C. 322. Luttrell's case, 4 Rep. 87, a.

(*h*) Chandler v. Thompson, 3 Camp. N. P. C. 80; and see Aldred's case, 9 Rep. 58, b.; and Cotterell v. Griffiths, 4 Esp. N. P. C. 69.

(*i*) *Per* Wray, C. J. in Aldred's case, 9 Rep. 58, b. Knowles v. Richardson, 1 Mod. 55. 2 Keb. 611, 642, S. C.

For disturbance in the enjoyment of houses and land.

plaintiff can prove, that by reason of the obstruction, he cannot enjoy the light in so free and ample a manner as he did before the injury, it will be sufficient. (*a*)

If an ancient window has been completely shut up with brick and mortar, above twenty years, it loses its privilege. (*b*) And where it appeared, that the plaintiff's messuage was an ancient house, and that, adjoining to it, there had formerly been a building, in which there was an ancient window next the lands of the defendant, and that the former owner of the plaintiff's premises, about seventeen years before, had pulled down this building and erected on its site another with a blank wall next adjoining the premises of the defendant, and the latter, about three years before the commencement of the action, erected a building next the blank wall of the plaintiff, who opened a window in that wall, in the same place where the ancient window had been in the old building, it was held, that he could not maintain any action against the defendant for obstructing the new window; because, by erecting the blank wall, the owner not only ceased to enjoy the right, but had evinced an intention never to resume the enjoyment. (*c*)

An action on the case also lies by the proprietor of lands against a tithe-owner, who has suffered his tithes to remain on the land more than a reasonable time after they were set out, to the detriment of the herbage. (*d*) But the action cannot be maintained, unless the tithes have been duly set out, as if the tithe of wheat be set out in shocks or riders, as they are termed in the north of England, instead of being set out in the sheaf, as the common law requires (*e*); or if the tithe of hay be set out in the swarth instead of the cock (*f*); or if it be set out in grass cocks, without having been tedded. (*g*) The tithe ought to be so set out, and the nine parts left so long, that the parson may

(*a*) Cotterell v. Griffiths, 4 Esp. N. P. C. 69.

(*b*) Lawrence v. Obee, 3 Campb. N. P. C. 514.

(*c*) Moore v. Rawson, 3 B. and C. 33.

(*d*) *Per* Lord Kenyon in Williams v. Ladner, 8 T. R. 76; or he may distrain the tithes damage feasant but he cannot turn in his cattle to consume them. *Ibid.* As to the parson's right of way to carry off the tithes, see *post*, p. 363.

(*e*) Shallcross, v. Jowle, 13 East, 261. Tenant v. Stubbing, 3 Anstr. 641.

(*f*) Moyes v. Willett, 3 Esp. N.P.C. 31. Shallcross v. Jowle, 13 East, 268.

(*g*) Newman v. Morgan, 10 East, 5; and see Halliwell v. Trappes, 2 Taunt. 55.

have an opportunity of judging, by the view, whether the tithe is fairly set out or not. (*a*) Notice should be given of the tithe having been set out, before bringing an action for not removing it. (*b*) Whether the whole crop has been left on the ground for a reasonable time after the tithe has been set out, is a question for the jury and not for the court. (*c*)

For disturbance in the enjoyment of houses and land.

So case may be maintained for other injuries to land, which do not amount to trespasses; as for stopping a watercourse, whereby the plaintiff's land is surrounded or overflowed. (*d*) So where the plaintiff had sold certain trusses of hay to the defendant within such a meadow, to be carried away from that meadow within a certain time, but the defendant suffered the hay to lie there, so that it putrified the meadow, an action on the case was held to be maintainable. (*e*) So also an action lies for erecting a smelting-house for lead, so near the land of the plaintiff, that the vapour and smoke kill his corn and grass, and damage his cattle. (*f*)

Suit to a mill, or the right of compelling all the inhabitants within a certain district, or other persons, to grind their corn at a particular mill, may arise either by tenure, custom, or prescription. (*g*) A custom, that all the householders in the parish of A. shall grind all their corn, which shall be used by them ground, within the parish, is good. (*h*) But a custom for inhabitants "to grind all their grain whatsoever by them spent or *sold*," at the plaintiff's mill, is a void custom. (*i*) A custom which binds the tenants and resiants within a manor, to grind at the lord's mill, all *their* corn and grain, which they use ground in their dwellings," does not prevent them from bringing and using in their

In the nature of a *secta ad molendinum*.

(*a*) *Per curiam*, in Halliwell v. Trappes, 2 Taunt. 59.

(*b*) Adm. *arg.* 3 Burr. 1892; and see Kemp. v. Filewood, 11 East, 358.

(*c*) Facey v. Hurdom, 3 Barn. and Cres. 213. See Tennant v. Stubbing, 3 Anstr. 644.

(*d*) 2 Rol. Ab. 140, l. 30. Com. Dig. action on the case for nuisance, (A).

(*e*) Case cited, Edwards v. Halinder, 2 Leon. 93. Com. Dig. *ubi sup.*

(*f*) 1 Rol. Ab. 89, l. 11.

(*g*) *Ante*, p. 36. Hix v. Gardiner, 2 Bulstr. 195. White v. Porter, Hardr. 177. Vin. Ab. Mill, (A). Drake v. Wigglesworth, Willes, 656; and see Vyvyan v. Arthur, 1 Barn. & Cres. 410.

(*h*) 1 Rol. Ab. 559, l. 36. Drake v. Wigglesworth, Willes, 654. Cort v. Berkbeck, Dougl. 218.

(*i*) Harbin v. Green, Hob. 189. Moor, 887, S. C.

In the nature of a *secta ad molendinum.*

dwellings, flour produced from corn ground at other mills. (*a*) Where the lord of a manor had two mills, and the tenants and resiants were, by custom, bound to grind all their malt, which they used in their dwellings, at the said mills, but might take it to either, at their own option, it was held, that the lord having pulled down one of the mills, had thereby suspended the custom. (*b*)

The inhabitants of a place may be bound by custom to grind their corn at the plaintiff's mill, although they be not his tenants (*c*); and such a custom is not confined to ancient houses; and if the inhabitant reside in a newly built house, he is still bound to grind his corn at the mill. (*d*)

If a man is bound to grind his corn at a mill, the owner of the mill is bound to keep it in order, with all necessaries. (*e*)

For disturbance of a watercourse.

An action on the case will also lie for disturbing a watercourse, to the water of which the plaintiff is entitled. Independently of any particular enjoyment which another has been accustomed to have, every person is entitled to the benefit of a flow of water in his own land, without diminution or alteration; but an adverse right may exist, founded on the occupation of another; and, although the stream be either diminished in quantity, or even corrupted in quality, as by means of the exercise of certain trades, yet, if the occupation of the party so taking or using it, has existed for so long a time as may raise the presumption of a grant; the other party, whose land is below, must take the stream, subject to such adverse right. (*f*) It is not necessary that the mode of enjoying a watercourse should always have been precisely the same; for where, in an action for a nuisance to a watercourse, the plaintiff declared on his possession, not stating the mill to be an ancient one, it was held to be no defence, that he had, within twenty years, somewhat altered the

(*a*) Richardson v. Walker, 2 Barn. and Cres. 827. Ord v. Buck, 3 Br. P. C. 106.

(*b*) Richardson v. Capes, 2 B. and C. 841.

(*c*) Drake v. Wigglesworth, Willes, 656.

(*d*) Seintley v. Bendell, cited Hardr. 177. Drake v. Wigglesworth, Willes. 658.

(*e*) Drake v. Wigglesworth, Willes, 657.

(*f*) *Per* Lord Ellenborough, C. J. in Beeley v. Shaw, 6 East, 214; and see Balston v. Bensted, 1 Campb. N. P. C. 463. Cox v. Matthews, 1 Vent. 237. 2 Saund. 113, b, notes, 5th edit. and *post*.

wheels, (*a*) The owner is not bound to use the water in the same precise manner, or to apply it to the same mill; for if he were, that would stop all improvements in machinery. (*b*) The mere obstruction of the water, which has been accustomed to flow through the plaintiff's lands, does not *per se* afford any ground of action; some benefit must be shewn to have arisen from the water going to his lands; or, at least, it is necessary to shew, that some deterioration was occasioned to the premises, by the subtraction of the water. (*c*)

For disturbance of a watercourse.

An obstruction of a public navigable river for twenty years, will not have the effect of preventing the public from still using it as such. (*d*)

An action on the case will lie for disturbing a man in the enjoyment of a right of way; but, before stating the law relative to this action, it will be proper to inquire into the various kinds of ways, and the means by which a right to the enjoyment of them may be acquired.

For disturbance of right of way.

There are four different kinds of ways. 1. A foot-way. 2. A horse-way, which includes a foot-way. 3. A carriage-way, which includes both a horse-way and foot-way. 4. A drift-way (*e*). The continued use and enjoyment of a private way for carriages, does not necessarily imply a right to use it as a drift-way, though the one has been often understood as implying the other. (*f*) But a general way for carriages may be good evidence, from which a jury may infer a right to a drift-way. (*g*) With regard to a public way, the presumption is, that it is for cattle as well as carriages. (*h*)

A right of way may be either public or private.

Highways.

A highway, or king's highway, is a way over which the king has a right of passage for himself and his subjects. (*i*) A way leading to any market town, and common for all travellers, and communicating with any great road, is a highway; but if it lead only to a church, or to a house, or village, or to the fields, it is

(*a*) Saunders v. Newman, 1 Barn. and Ald. 258.

(*b*) *Per* Abbot, J. *Ibid.* Luttrel's case, 4 Rep. 87, a.

(*c*) Williams v. Morland, 2 B. and C. 915. 4 D. and R. 583, S. C.

(*d*) Vooght v. Winch, 2 B. and A. 662. 3 Camp. 227. 7 East, 199.

(*e*) See Co. Litt. 56, a.

(*f*) Ballard v. Dyson, 1 Taunt. 284, 285.

(*g*) *Per* Mansfield, C. J. *Ibid.*

(*h*) *Ibid.*

(*i*) Terms de la Ley, Chimin. But subject to this right, the owner of the soil may maintain trespass. See *post.*

For disturbance of right of way.

a private way; whether it be a public or private way, is a matter of fact, and depends much on common reputation. (*a*) If a highway lies in an open field, and passengers are accustomed to turn out of the great track, when it is foundrous, these outlets are part of the highway. (*b*) A navigable river is in the nature of a highway; and if the river alters its course, the way alters. (*c*)

Dedication to the public.

When the owner of land builds houses upon it, forming a street, which he permits to be used as a highway, it is a dedication of the land to the public, so far as the public have occasion for it; *i. e.* for a right of passage. (*d*) If the owner of the soil throws open a passage, and neither marks by any visible distinction, that he means to preserve all his rights over it, nor excludes persons from passing over it by positive prohibition, he shall be presumed to have dedicated it to the public. (*e*) But proof of a bar having been placed across the street, soon after the houses which form the street were finished, will rebut the presumption of dedication, though the bar was soon afterwards knocked down; since which period, the way has been used as a thoroughfare; for a dedication must be made openly, and with a deliberate purpose. (*f*) The question of dedication depends upon the time, and the nature of the enjoyment which persons have had of the passage over the land; therefore, where the plaintiff erected a street leading out of a highway, across his own close, and terminating at the edge of the defendant's adjoining close, which was separated by the defendant's fence, from the end of the street, for twenty-one years, (during nineteen of which the houses were completed, and the street publicly watched, cleans-

(*a*) *Per* Hale, C. J. Austin's case, 1 Vent. 189. Hawk. P. C. b. 1. c. 76, s. 1.

(*b*) 1 Rol. Ab. 390, l. 10. Com. Dig. Chimin. (A. 1). Bullard v. Harrison, 4 M. and S. 393.

(*c*) Com. Dig. Chimin, (A. 1). As to stopping up, and diverting highways, and the writ of *ad quod damnum*, see stat. 13 G. 3, c. 78, 55 G. 3, c. 68. F. N. B. 221. R. v. Warde, Cro. Car. 266. Vin. Ab. *ad quod. dam.* Waite v. Smith, 8 T. R. 133. Davidson v. Gill, 1 East, 64. R. v. Justices of Hertfordshire, 3 M. and S. 459. De Ponthieu v. Pennyfeather, 1 Marsh. 261. 5 Taunt. 634, S. C. R. v. Justices of Essex, 1 Barn. and Ald. 373. R. v. Justices of Worcestershire, 2 Barn. and Ald. 228. R. v. Sheppard, 3 Barn. and Ald. 414. R. v. Justices of ——— 1 Chit. Rep. 164. R. v. Kirk, 1 Barn. and Cres. 21. R. v. Justices of Kent, 1 Barn. and Cres. 622. R. v. Casson, 3 Dowl. and Ryl. 36.

(*d*) Lade v. Shepherd, 2 Str. 1004.

(*e*) *Per* Lord Ellenborough. R. v. Lloyd, 1 Camp. N. P. C. 262.

(*f*) Roberts v. Karr, 1 Camp. N.P.C. 262, note; and see Lethbridge v. Winter, *Ibid.* 263, note.

ed, and lighted; and both foot-ways, and half the horse-way thereof, paved at the expense of the inhabitants,) it was held, that this street was not so dedicated to the public, that the defendant, pulling down his own wall, might enter it at the end adjoining to his land, and use it as a highway. (*a*) Although the same period of time is not necessary to dedicate a highway, as is required to establish a right of possession to land, against a hostile claim, yet time is a material ingredient. (*b*) In one case, it is said, that six years were held sufficient (*c*); and where the *locus in quo* had been in lease for a long term, up to the year 1780, and from that time till the year 1788, the public were permitted to have the free use of it as a way, Lord Kenyon held it to be quite a sufficient time for presuming a dedication of the way to the public. (*d*) If the land is in the possession of a tenant, such tenant cannot dedicate it to the public, so as to bind the owner of the fee; and, therefore, where the *locus in quo*, which was not a thoroughfare, had been under lease from 1719 to 1818, but as far back as living memory could go, it had been used by the public, and lighted, paved, and watched, under an act of parliament, in which it was enumerated as one of the streets in Westminster; and after 1818, the plaintiff, who previously lived for twenty-four years in its neighbourhood, inclosed it, it was held, that under these circumstances, the jury were well justified in finding, that there was no public right of way. (*e*) However, after a long lapse of time, and a frequent change of tenants, Lord Ellenborough said, that from the notorious and uninterrupted use of a way by the public, he should presume, that the landlord had notice of the way being used, and that it was so used with his concurrence. (*f*)

For disturbance of right of way.

Where there has been a public king's highway, no length of

(*a*) Woodyer v. Hadden, 5 Taunt. 125.

(*b*) *Per* Gibbs, J. Woodyer v. Hadden, 5 Taunt. 135.

(*c*) Case mentioned by Lord Kenyon, Trustees of Rugby Charity v. Merryweather, 11 East, 376, note.

(*d*) Trustees of Rugby Charity v. Merryweather, 11 East, 376, note; but this case has been doubted. See Woodyer, v. Hadden, 5 Taunt. 142. Wood v. Veal, 5 Barn. and Ald. 457. See also R. v. St. Benedict, 4 B. and A. 447.

(*e*) Wood v. Veal, 5 Barn. and Ald. 454. 2 B. and C. 688; and see Daniel v. North, 11 East, 372. Nicholas v. Chamberlain, Cro. Jac. 122.

(*f*) R. v. Barr, 4 Campb. N. P. C. 16. Notice to the steward is notice to the landlord. *Ibid.* Doe dem. Foley v. Wilson, 11 East, 56.

For disturbance of right of way.

time, during which it may not have been used, will prevent the public from resuming the right, if they think proper. (*a*)

There are four modes of claiming a private way: by grant, by prescription, by custom, and by express reservation.

By grant.

A way may be claimed by grant, as where A. grants that B. shall have a way through such a close. (*b*) So if A. covenants that B. shall have and use such a way, it amounts to a grant. (*c*) And if a man seised of Whiteacre and Blackacre, uses a way through Blackacre to Whiteacre, and afterwards grants Whiteacre, with all ways, &c., the way through Blackacre passes to the grantee. (*d*) So if a way be appendant to land, by a lease of the land, the way passes to the lessee without an express grant. (*e*) When certain houses, together with a piece of ground, which was part of an adjoining yard, were leased to a tenant, together with all ways, with the said premises, or any part thereof, used or enjoyed before, and at the time of the lease granted, the whole of the yard was in the occupation of one person, who had always used and enjoyed a certain right of way to every part of that yard, it was held, that the lessee was entitled to such right of way to the part of the yard demised to him. (*f*) An existing right of way will pass under the word "appurtenances" (*g*); but not where it has been extinguished by unity of possession. (*h*)

Twenty years adverse user of a right of way is sufficient evidence for a jury to presume a grant, although such grant must have been made within twenty-six years, all former ways being at that time extinguished by the operation of an enclosure act. (*i*)

Where A. granted to B. a piece of land of unequal breadth, which was described in the conveyance as abutting on a road on

(*a*) *Per* Gibbs, C. J. in R. v. Inhab. of St. James, Taunt. MS. 2 Selw. N. P. 1312; and see Vooght v. Winch. *ante*, p. 359.

(*b*) Com. Dig. Chimin, (D. 3).

(*c*) Holmes v. Seller, 3 Lev. 305.

(*d*) Staple v. Hayden, 6 Mod. 3; see Harding v. Wilson, 2 Barn. and Cres. 100.

(*e*) *Per* 3 Justices, Beaudeley v. Brook, Cro. Jac. 190. Com. Dig. Chimin, (D. 3).

(*f*) Kooystra v. Lucas, 5 B. and A. 830. 1 Dowl. and Ryl. 506, S. C.

(*g*) *Per* Eyre, C. J. Whalley v. Thomson, 1 Bos. and Pul. 375. Nicholas v. Chamberlaine, Cro. Jac. 121. Plowd. 173; see Harding v. Wilson. 2 B. and C. 100.

(*h*) Morris v. Edgington, 3 Taunt. 30. Whalley v. Thomson, 1 Bos. and Pul. 371.

(*i*) Campbell v. Wilson, 3 East, 294. See Doe v. Read, 5 B. and A. 237.

the grantor's own soil; but, in fact, the land only abutted in the broadest part on the road, while in the narrowest part, a slip of the grantor's land intervened between the road and the premises granted, it was held, that the grantor, and those claiming under him, were concluded from preventing the grantee from passing over this slip of land into the road. (*a*) For disturbance of right of way.

As a right of way may be created by an express grant; so it may also arise by an implied grant, where the circumstances are such, that the law will imply such grant. This right of way has been sometimes termed a way *of necessity*, but it is, in fact, only a right of way by implied grant, for there seems to be no difference where a thing is granted by express words, and where it passes as incident to the grant, by operation of law. (*b*) Thus where a man having a close surrounded by his own land, grants that close to another, the grantee has a way to the close over the grantor's land, as incident to the grant. (*c*) Such a way of necessity is not extinguished by unity of possession, for unity of possession appears to be the foundation of the right. (*d*) But it is limited by the necessity which created it; and if at any subsequent period, the party entitled to it can approach the place to which it leads, by passing over his own land, it ceases. (*e*) By implied grant.

Amongst ways of necessity may be classed the way which a rector has, as incident to his right to tithes, to carry them away; he must, however, carry them away by the usual road, over which the other nine parts are conveyed (*f*), and he cannot use the way for any other purposes. (*g*) So where a man leases, reserving the trees, he may enter in order to shew the trees to a buyer. (*h*) So if a man grants to another certain trees in his wood, the grantee may come with carts over the grantor's land to carry away the trees (*i*); and these may be termed ways of

(*a*) Roberts v. Karr, 1 Taunt. 495.

(*b*) 1 Saund. 323, a, notes, 5th edit.

(*c*) Clark v. Cogge, Cro. Jac. 170. Com. Dig. Chimin, (D. 3) (D. 4); and see Farmers of Newgate Market v. Dean of St. Paul's, 12 Mod. 372.

(*d*) 1 Saund. 323, a, note, 5th edit. Shary v. Piggot, 3 Bulstr. 340. Noy, 84, S. C.; and see 1 Bos. and Pul. 374, Willes, 658; and Buckby v. Coles, 5 Taunt. 311.

(*e*) Holmes v. Goring, 2 Bing. 76.

(*f*) Cobb v. Selby, 2 Bos. and Pul. N. R. 466. 1 Bulstr. 108. 2 Lutw. 1314. 1 Saund. 323, a, notes, 5th edit.

(*g*) *Per* Mansfield, C. J. Ballard v. Dyson, 1 Taunt. 284.

(*h*) 2 Rol. Ab. 74, l. 41. 1 Rol. Ab. 109, l. 5.

(*i*) Liford's case, 11 Rep. 52, a. Vin. Ab. Incident; and see *post*, in "Trespass."

For disturbance of right of way.

necessity. So also if a man has a right to wreck thrown on another man's land, by necessary consequence, he has a right of way over the same land to take it. (*a*)

Under the grant of a free and convenient way in, through, and over, a slip of land, with licence to make and lay causeways, &c. for the purpose of carrying coals, amongst other articles, and to use the same with carriages, the grantee has a right to lay a framed waggon-way. (*b*) And where A. granted to B., his heirs and assigns, occupiers of certain houses, abutting on a piece of land about eleven feet wide, which divided those houses from a house then belonging to A., the right of using the said piece of land as a foot or carriage-way, and gave him "all other liberties, powers, and authorities, incident or appurtenant, needful or necessary to the use, occupation, or enjoyment of the said road-way or passage," it was held, that under these words, B. had a right to put down a flag-stone upon this piece of land, in front of a door opened by him out of his house into the piece of land. (*c*) But under a grant of way from A. to B., *in, through and along* a particular close, the grantee is not justified in making a transverse way *across* the same. (*d*) And if a person has a right of way through a close, in a particular direction, and afterwards purchases other closes adjoining, he cannot justify using the way to the latter closes. (*e*) So a right of way for agricultural purposes, will not justify the party in using the way for carrying lime from a lime quarry newly opened. (*f*)

The grantee of a way has a right to repair it, as incident to the grant (*g*); and the grantor is not bound to repair. (*h*) If a private way be impassable, the grantee cannot break out and go *extra viam*, as in the case of a public way. (*i*)

(*a*) Anon. 6 Mod. 149.

(*b*) Senhouse v. Christian, 1 T. R. 560; and see Hodgson v. Field, 7 East, 613; and Nicholas v. Chamberlain, Cro. Jac. 121.

(*c*) Gerrard v. Cooke, 2 Bos. and Pul. N. R. 109. Vin. Ab. Incidents; and see the cases cited in the last note.

(*d*) Senhouse v. Christian, 1 T.R. 560.

(*e*) 1 Rol. Ab. 391, l. 50. 1 Lutw. 114. Howell v. King, 1 Mod. 190. Senhouse v. Christian, 1 T. R. 569. See also Wright v. Rattray, 1 East, 377, and *post*, in "Trespass."

(*f*) Jackson v. Stacey, Holt's N.P.C. 455.

(*g*) Com. Dig. Chimin, (D. 6). Godb. 53. *Per* Heath and Chambre, J. Gerrard v. Cooke, 2 Bos. and Pul. N. R. 109. Vin. Ab. Incidents, (A).

(*h*) Com. Dig. Chimin, (D. 6); unless by express stipulation or prescription. 1 Saund. 322, a, notes. Rider v. Smith, 3 T. R. 766.

(*i*) Bullard v. Harrison, 4 M. and S. 387. Taylor v. Whitehead, Dougl. 744.

For disturbance of right of way.

By prescription.

Where the owner of land has used a way from such land to some other place, from time immemorial, he may in an action of trespass brought against him, prescribe, that he and all those whose estate he has in the land, have from time immemorial had and used the way. (*a*) Where this plea is pleaded by a particular tenant, he must set forth the seisin in fee, and the prescription, and then trace his own title from the owner of the fee. (*b*)

Unity of possession of the land, in respect of which the way is claimed, and of the land over which the way passes, will extinguish the right of way, for the prescription is gone, and the way is against common right. (*c*)

Where A., the owner of a close, situate within a close belonging to B., had a prescriptive right of way through B.'s, close to his own; and twenty-four years before the time when, &c. B. stopped up the old way, and made a new way which had been used ever since, but latterly B. stopped up the new way; in trespass by B. against A. for going over the new way, it was held, that the latter could not justify using this way, but that he should either have gone the old way and thrown down the enclosure, or should have brought an action against B. for stopping up the old way; the new way being only a way by sufferance, during the pleasure of both parties. (*d*) But as long as the new way lay open, the defendant might be justified in passing along it. (*e*)

By custom.

A custom that every inhabitant of such a vill, shall have a way over such land, either to church or market, is good, because it is only an easement but not a profit. (*f*)

By express reservation.

A right of way may be claimed by express reservation, as where A. grants land to another, reserving to himself a way over such land. (*g*)

Nature of the injury.

An action on the case lies for the disturbance of a right of

(*a*) Com. Dig. Chimin, (D. 2).

(*b*) Scilly v. Daily, 2 Salk. 562. Comb. 476, S. C. Com. Dig. Chimin, (D. 2). Staple v. Haydon, 6 Mod. 4. See post, in "Trespass."

(*c*) 1 Rol. Ab. 935, Whalley v. Thomson, 1 Bos. and Pul. 371. Vin. Ab. Extinguishment, (A). (C).

(*d*) Reynolds v. Edwards, Willes. 282.

(*e*) Id. 287. Horne v. Wedlake, Yelv. 141.

(*f*) Gateward's case, 6 Rep. 60 b. Co. Litt. 110, b. Foxall v. Venables, Cro. Eliz. 180; and see Fitch v. Rawling, 2 H. Bl. 393.

(*g*) 1 Rol. Ab. 109, l. 45. Com. Dig. Chimin, (D. 2); and see Earl of Cardigan v. Armitage, 2 Barn. and Cres. 197.

For disturbance of right of way.

way, either by reservation, grant, or prescription (*a*), and such disturbances may be, either by absolutely stopping the way, or by ploughing up the land through which the way lies (*b*), or by damaging the way with carriages, so that it is of no use, &c. (*c*) If the way be a highway, no action can be maintained for the disturbance, unless the plaintiff has sustained some special damage; as, if a man makes a ditch in the highway, and the plaintiff falls in and maims himself (*d*), or if by the stoppage of the highway, the plaintiff has been constrained to use a longer and more difficult way (*e*); but where the inconvenience is general only, and no particular damage has been sustained by any one individual, no action on the case can be supported. (*f*) A navigable river being in the nature of a highway (*g*), it has been held, that an action on the case may be maintained for the obstruction of a public navigable creek, if the plaintiff has sustained special damage. (*h*) Where there is a direct special damage, an action on the case lies, for not repairing as well as for a nuisance in a highway, if an individual is liable to repair (*i*), but otherwise, where the county or parish is liable. (*k*) If the immediate and proximate cause of the damage is the unskilfulness of the plaintiff, he cannot recover (*l*), nor unless he use ordinary care to avoid the obstruction. (*m*)

For disturbance of common.

A right of common is a privilege which a man may enjoy, of taking a profit in common with many in the land of another, as to feed his beasts, catch fish, dig turf, cut wood, or the like; that is to say, common of pasture, of piscary, of turbary, and of estovers. (*n*) Common of pasture is of four kinds, appendant, appurtenant, because of vicinage, or in gross. (*o*)

(*a*) Com. Dig. Act. on the case for disturbance, (A. 2). 1 Rol. Ab. 109, l. 45.

(*b*) 2 Rol. Ab. 140, l. 7.

(*c*) Laughton v. Ward, 1 Lutw. 111.

(*d*) Co. Litt. 56, a. Williams's case, 5 Rep. 73, a.

(*e*) Com. Dig. Act. on the case for nuisance, (C). Hart v. Basset, T. Jones, 156. Maynell v. Saltmarsh, 1 Keb. 847. Iveson v. Moore, 1 Ld. Raym. 486. 1 Salk. 15, S. C. Greasly v. Codling, 2 Bing. 263.

(*f*) Fineux v. Hovenden, Cro. Eliz. 664. Paine v. Partrich, Carth. 193. Hubert v. Groves, 1 Esp. N. P. C. 148. 2 Bing. 266.

(*g*) *Ante*, p. 360.

(*h*) Rose v. Miles, 4 M. and S. 101.

(*i*) Hale's note, Co. Litt. 56, a (2).

(*k*) Russel v. Men of Devon, 2 T. R. 671.

(*l*) Flower v. Adam, 2 Taunt. 314.

(*m*) Batterfield v. Forrester, 11 East, 60.

(*n*) Co. Litt. 122, a. Com. Dig. Common, (A). 2 Bl. Com. 32.

(*o*) Finche's Law, 157.

For disturbance of common.

Common appendant.

Common appendant is of common right (*a*), and therefore a man need not prescribe for it. (*b*) It must have existed from time immemorial (*c*), and can only be appendant to arable land, and not to a house or meadow (*d*), but it may be claimed as appendant to a cottage, for a cottage contains a curtilage (*e*), and it may also be claimed as appendant to a manor, carve of land, &c. which comprehend a house, meadow, &c. besides arable land, in which case it shall be intended appendant only to the arable land (*f*), and if part of the arable be converted into pasture, the common remains. (*g*) Common appendant may be for the whole year, or for a time limited. (*h*)

Common appendant cannot be claimed for a certain number of cattle, but for such only as are *levant* and *couchant* on the land, and therefore it cannot be severed even for a moment, or turned into a common in gross. (*i*) It can only be for beasts of the plough which till the land, as horses, oxen, &c. or for cattle which manure the land, as cows and sheep, and therefore, if a man prescribes for common appendant for all cattle it will be bad (*k*), and the cattle must be *levant* and *couchant*, that is, as many as are necessary to plough and manure the land in proportion to the quantity of it (*l*), or as many as the land will maintain during the winter (*m*), or as many as the land is capable of maintaining, though they be not maintained upon it during the winter. (*n*) Common appendant cannot be used with the cattle of a stranger (*o*), but it may be used with cattle hired or borrowed to plough or manure the land. (*p*)

(*a*) 1 Rol. Ab. 396, l. 44. Co. Litt. 122, a.

(*b*) Br. Ab. Common, 11, 35. Tyringham's case, 4 Rep. 37, a. Co. Litt. 122, a. Hargrave's note, (2).

(*c*) 1 Rol. Ab. 396, l. 40.

(*d*) 1 Rol. Ab. 397, l. 28, 29. Scholes v. Hargraves, 5 T. R. 46.

(*e*) Emerton v. Selby, 1 Salk. 169. 2 Ld. Raym. 1015, S. C.; but *quære*, since stat. 15 Geo. 3, c. 32.

(*f*) Tyringham's case, 4 Rep. 37, b. Com. Dig. Common, (B). Co Litt. 122.

(*g*) *Ibid.*

(*h*) 1 Rol. Ab. 396, l. 49. Com. Dig. Common, (B).

(*i*) Musgrave v. Cave, Willes, 322.

(*k*) 1 Rol. Ab. 397, l. 38, 44. Tyringham's case, 4 Rep. 37, a. Bennet v. Reeve, Willes, 231.

(*l*) *Per* Willes, C. J. in Bennet v. Reeve, Willes, 231, 2.

(*m*) *Per* Buller, J. in Scholes v. Hargreaves, 5 T. R. 48, 49. Cole v. Foxman, Noy, 30.

(*n*) Cheesman v. Hardham, 1 B. and A. 706. Rogers v. Benstead, MS. Selw. N. P. 413, 4th edit.

(*o*) 1 Rol. Ab. 402, l. 34. F. N. B. 180 B.

(*p*) 1 Rol. Ab. 402, l. 39. Bennet v. Reeve, Willes, 231, 2. See Woolrych on Com. 42.

For disturbance of common.

Common appendant may be apportioned by alienation of part of the land to which the common is appendant, and so also, where the commoner purchases part of the land in which, &c. (*a*), but in the latter case it is otherwise, with regard to common appurtenant (*b*). Unity of possession however extinguishes both common appendant and appurtenant. (*c*)

Common appurtenant.

Common appurtenant is founded on a grant or a prescription, which supposes a grant, and may be granted at this day (*d*), and may be claimed as appurtenant to any kind of land. (*e*)

Common appurtenant may be granted for all manner of cattle, as hogs, goats, &c. (*f*), and either for a certain number or without number (*g*); in the latter case, the measure of profit which the commoner is entitled to, is as in common appendant, *levancy* and *couchancy* (*h*), the latter species of common appurtenant cannot therefore be converted into common in gross, but when it is for a certain number of beasts it may. (*i*)

Common appurtenant may be claimed for cattle *levant* and *couchant* upon a messuage, for it includes a curtilage (*k*), but it cannot be claimed as appurtenant to a house without any land. (*l*) Common of pasture without land may be parcel of a manor, and demised and demisable by copy of court roll. (*m*)

Common appurtenant may be apportioned by conveyance of part of the land to which the right is appurtenant (*n*), but if the commoner purchases part of the land in which, &c. the common is extinct (*o*), and this common as well as common appendant, may become extinct by unity of possession. (*p*) But a right of common appurtenant to a copyhold tenement, is not lost by

(*a*) Co. Litt. 122, a. Wild's case, 8 Rep. 79.

(*b*) Co. Litt. 122, a.

(*c*) Tyringham's case, 4. Rep. 38, a.

(*d*) Sacheverell v. Porter, Cro. Car. 482. W. Jones, 396, S. C. Co. Litt. 122, a. Com. Dig. Common, (C). Cowlam v. Slack, 15 East, 108.

(*e*) Tyringham's case, 4 Rep. 37, a.

(*f*) Co. Litt. 122, a. 1 Rol. Ab. 397, l. 44, 401, l. 23.

(*g*) F. N. B. 181. N. 1 Rol. Ab. 401, l. 15. Com. Dig. Common, (C).

(*h*) 1 Rol. Ab. 398, l. 40. Drury v. Kent, Cro. Jac. 15. Bennet v. Reeve, Willes, 229. *Ante*, p. 367.

(*i*) Drury v. Kent, Cro. Jac. 15. Bunn v. Channen, 5 Taunt. 244.

(*k*) Scambler v. Johnson, 2 Show. 248. T. Jones, 227, S. C. Scholes v. Hargreaves, 5 T. R. 49.

(*l*) Scholes v. Hargreaves, 5 T. R. 46.

(*m*) Musgrave v. Cave, Willes, 319.

(*n*) Sacheverell v. Porter, Cro. Car. 482, Hob. 235, Co. Litt, 122, a.

(*o*) Wild's case, 8 Rep. 79, a. Tyringham's case, 4 Rep. 37.

(*p*) Bradshaw v. Eyre, Cro. Eliz. 570, Co. Litt. 114, b.

forfeiture and re-grant (*a*). However, where a right of common in the lord's waste, is annexed by custom to a copyhold tenement, it is extinguished by enfranchisement of the tenement, for the common was only gained by custom, and annexed to the customary estate, and is therefore lost with it (*b*); but where the common is without the manor, of which the copyhold is parcel, it is annexed to the land, and not to the customary estate, and is not therefore extinguished by enfranchisement of the copyhold (*c*). Suspension of the possession, as by taking a lease of the land for twenty years, does not destroy the right (*d*), but by taking a lease of parcel of the land, the whole common is suspended (*e*). For disturbance of common.

Common of vicinage is not strictly a *right* of common, for if it were, it would prevent an inclosure, which it has been always held that it will not. It arises where the inhabitants of two townships, or vills, intercommon in wastes contiguous to each other, so that the cattle of one township or vill, stray into the wastes belonging to the other; such a custom however is only an excuse for a trespass (*f*). Where there is only a partial enclosure, so as not to prevent the cattle from straying, common of vicinage still continues (*g*). Common of vicinage.

Common in gross is such a common as is neither appendant nor appurtenant to land, but is annexed to a man's person, being granted to him and his heirs by deed; or it may be claimed by prescriptive right, as by the parson of a church, or the like corporation sole. It is a separate inheritance, entirely distinct from landed property, and may be vested in one who has not any land in the manor (*h*). Common appurtenant for a certain number of cattle, may be converted into common in gross (*i*). It seems that a right of common in gross, *sans nombre*, in the latitude in which it was formerly understood, cannot exist (*k*). Common in gross.

(*a*) Badger v. Ford, 3 B. & A. 153.
(*b*) Massam v. Hunt, 1 Brownl. 220. Yelv. 189, S. C. Fort v. Ward, Moor, 667.
(*c*) Barwick v. Matthews, 5 Taunt. 365. Crouther v. Oldfield, 1 Salk. 366.
(*d*) Co. Litt. 114, b.
(*e*) Wild's case, 8 Rep. 79, a.
(*f*) Musgrave v. Cave, Willes, 322. Co. Litt, 722, a. Corbet's case, 7 Rep. 5, b. Bromfield v. Kirber, 11 Mod. 73. 2 Bl. Com. 33.
(*g*) Gullett v. Lopes, 13 East, 348.
(*h*) 2 Bl. Com. 34.
(*i*) *Ante*, p. 368.
(*k*) *Per* Kelynge, in Mellor v. Spateman, 1 Saund. 346. Bennett v. Reeve, Willes, 232; but see Co. Litt. 122, a. Weekly v. Wildman, 1 Ld. Raym. 405. 3 Bl. Com. 239. Woolrych on Commons, 75.

For nuisance to a market.

An action on the case lies, if a new market be erected near to an ancient market, held upon the same day (*a*), and it may be a nuisance, though it is held on a different day. (*b*) But where the grantee of a market under letters patent from the crown, suffered another to erect a market in his neighbourhood, and to use it for the space of twenty-three years without interruption, it was adjudged that such user operated as a bar to an action on the case for a disturbance of his market. (*c*) An action on the case also lies for obstructing the passage to the plaintiff's market. (*d*)

For disturbance in a pew.

An action on the case also lies for disturbing the plaintiff in the possession of a pew in a church, which he claims by prescription as appurtenant to a messuage in the parish (*e*), or by a faculty annexing it to a messuage. (*f*) A lay impropriator cannot grant a seat in the chancel of the church, so as to enable the grantee to bring trespass for a disturbance. (*g*)

For disturbance in the enjoyment of other possessions and rights.

An action on the case also lies for the disturbance of the plaintiff in the enjoyment of the profits of his office (*h*), or for disturbing him in the execution of his office. (*i*) So it lies for a lord of a manor who prescribes to have toll, and is disturbed in the collecting of it (*k*), or for a lord of a leet who is disturbed in holding his court (*l*), or in collecting the fines, amercements, &c. imposed at the leet. (*m*) So case lies by the owner of an ancient ferry against one who sets up a new ferry near to it (*n*), and by a lessor who is disturbed in entering to view, whether his lessee

(*a*) 2 Rol. Ab. 140, l. 10. Com. Dig. Market, (C. 2). Vin. Ab. Nuisance, (G), pl. 2, 3.

(*b*) Yard v. Ford, 2 Saund. 172, F. N. B. 184, A. note, (b).

(*c*) Holcroft v. Heel, 1 Bos. & Pul. 400. See 2 Saund. 174, (notes) 5th edit.

(*d*) 1 Rol. Ab. 106, l. 40. 3 Bl. Com. 236.

(*e*) Stocks v. Booth, 1 T. R. 428. Mainwaring v. Giles, 5 Barn. and Ald. 361. Rogers v. Brooks, cited in 1 T. R. 431, (note). Com. Dig. Action on the case for disturbance, (A. 3). As to what is presumptive evidence of a prescriptive right, see *post*.

(*f*) Mainwaring v. Giles, 5 B. & A. 356.

(*g*) Clifford v. Wicks, 1 Barn. & A. 498.

(*h*) Berkley v. Lord Pembroke, Moor, 706. Com. Dig. action upon the case for disturbance, (A. 5). B. N. P. 76.

(*i*) Shaw v. a Burgess of Colchester, 2 Mod. 228. Stanhope v. Ecquister, Latch, 87. Com. Dig. *ubi sup.*

(*k*) 1 Rol. Ab. 106, l. 43.

(*l*) *Ibid.* l. 49.

(*m*) *Ibid.* l. 45.

(*n*) Bull. N. P. 75.

has committed waste (*a*), or for a parishioner who is prevented from entering a vestry-room where he has a right to be present. (*b*) So in general an action on the case will lie for a disturbance in the enjoyment of any easement, as a right of landing nets on another man's ground. (*c*)

For disturbance in the enjoyment of other possessions.

With regard to the title of the plaintiff in this action, it was formerly held (*d*) that a party could not maintain an action for a nuisance in stopping the lights of his house, unless he had gained a right in the lights by prescription; but in several later cases it has been decided that evidence of an adverse enjoyment of the lights for twenty years or upwards unexplained, affords a presumption of a grant (*e*), which is sufficient to entitle the plaintiff to this action. The same law exists with regard to other easements, and incorporeal rights. Thus an adverse unexplained enjoyment of a right of way for above twenty years is sufficient to warrant the jury in presuming a grant of the way, even though such grant must have been made within twenty-six years, all former ways being at that time extinguished by operation of an inclosure act (*f*); and so where the way has been used for thirty years, a grant may be presumed, though there had been an absolute extinguishment of the right of way some years before by unity of possession. (*g*) So in an action on the case for disturbing the plaintiff in the possession of a pew, of which he, and those under whom he claimed, had been in the uninterrupted possession for thirty-six years, the judge recommended it to the jury to presume a title in the plaintiff. (*h*) However, in another case it was adjudged, that though uninterrupted possession of a pew in the chancel of a church for thirty years, was presumptive evidence of a prescriptive right to the pew, in an

By whom.

(*a*) 1 Roll. Ab. 109, l. 5.

(*b*) Com. Dig. Action upon the case for disturbance, (A. 6).

(*c*) Gray v. Bond, 2 Br. and Bing. 667.

(*d*) Bowry v. Pope, 1 Leon. 168. Cro. Eliz. 118, S. C.

(*e*) Lewis v. Price, Dougal v. Wilson, Darwin v. Upton, reported 2 Saund. 175, (notes) 5th edit.

(*f*) Campbell v. Wilson, 3 East, 294. In cases of rights of way, &c. the original enjoyment cannot be accounted for unless a grant has been made; *per* Holroyd, J. Doe v. Reed, 5 B. & A. 237. And see Doe v. Hilder, 2 B. & A. 791.

(*g*) Keymer v. Summers, cited in 3 T. R. 157. B. N. P. 74.

(*h*) Rogers v. Brooks, cited in 1 T. R. 431, (note). But the pew must be appurtenant to a messuage in the parish. See *post*, and see Mainwaring v. Giles, 5 B. and A. 356.

By whom.

action against a wrong doer, yet that such presumption might be rebutted, by proof that the pew had no existence thirty years ago.(*a*) So also, twenty years exclusive possession of a stream of water in any particular manner affords a conclusive presumption of right in the party enjoying it, derived from a grant or act of parliament; but less than twenty years enjoyment may or may not afford such a presumption, according as it is attended with circumstances to support or rebut the right. (*b*) So where it had been proved, that the owners of a fishery and their lessees had for above twenty years last past, publicly landed their nets on another's ground, and had occasionally repaired the landing places, it was held that it had been properly left to the jury to presume a grant of the right of landing nets to the owners of the fishery. (*c*)

But though an uninterrupted possession for twenty years or upwards be sufficient evidence to be left to a jury to presume a grant, yet the rule must be taken with this qualification, that the possession was with the acquiescence of him who was seised of an estate *of inheritance:* for a tenant for life, or years, has no power to grant any such right for a longer period than during the continuance of his particular estate (*d*); but if the easement existed previously to the commencement of the tenancy, the fact of the premises having since been for a long period in the possession of a tenant, will not defeat the presumption of a grant. (*e*)

If the nuisance be of a permanent nature, and injurious to the reversion, an action may be brought by the reversioner, as well as by the tenant in possession, each of them being entitled to recover his respective loss. (*f*)

Tenants in common may join in an action to recover damages for a nuisance, which concerns the tenements which they hold in common. (*g*)

(*a*) Griffiths v. Matthews, 5 T. R. 296.

(*b*) *Per* Lord Ellenborough, C. J. in Bealey v. Shaw, 6 East, 215.

(*c*) Gray v. Bond, 2 B. and B. 667.

(*d*) 2 Wms. Saund. 175, d. note, 5th edit. Daniel v. North, 11 East, 372. Barker v. Richardson, 4 B. and A. 579. Wood v. Veal, 5 B. and A. 454. See *ante.*

(*e*) Cross v. Lewis, 2 Barn. and Cres. 686.

(*f*) Biddlesford v. Onslow, 3 Lev. 209. Queen's College v. Hallett, 14 East, 489. 1 Saund. 322, b, notes, 5th edit. Jeffer v. Gifford, 4 Burr, 2141. Com. Dig. Act. on the case for nuisance, (B). As to the damages, see Evelyn v. Raddish, Holt's N. P. C. 543.

(*g*) Litt. s. 315. Co. Litt. 198, a. Bac. Ab. Jointenants, (K).

By whom.

If the house, &c. affected by the nuisance be aliened, the alienee may maintain an action against the party who did the wrong, without any previous request, though where the tenement which causes the nuisance is aliened, an action cannot be brought against the alienee for continuing it, without a previous request. (*a*)

Against whom.

An action on the case for a nuisance may be brought against him who levied the nuisance originally, or against his alienee, who permits the nuisance to be continued, for the continuance is a new wrong; but a request must be made to remove or abate the nuisance before the alienee can be sued. (*b*) If the defendant still continues the nuisance, the plaintiff, who has recovered once, may bring a new action for the continuance (*c*), in which the jury will be directed to give larger damages. In the first action it is usual to give nominal damages only, which however entitle the plaintiff to full costs. Where the plaintiff has recovered against the defendant, a tenant for years, for the erection of a nuisance, he may afterwards maintain an action against him for the continuance of it, though the defendant has made an under lease of the premises to another. (*d*) In an action for not railing in an area, whereby the plaintiff was hurt, it is no defence that when the defendant took possession of the house, and as long back as could be remembered, the area was in the same open state as when the accident happened. (*e*) Where the landlord of a house demised by lease, under his contract with his tenant, employed workmen to repair the house, and directed the repairs, he was held answerable for a nuisance in the house, occasioned by the negligence of his workmen. (*f*) And so in an action for obstructing the plaintiff's lights, a clerk who superintended the erection of the building, by which they were darkened, and who alone directed the workmen, may be joined as a co-defendant with the original contractor. (*g*) But an action on the case for not repairing fences, whereby another party is damnified, can

(*a*) Penruddock's case, 5 Rep. 101, a. Winsmore v. Greenbank, Willes, 583.

(*b*) Penruddock's case, 5 Rep. 101, a. Jenk. Cent. 260, S. C.

(*c*) Com. Dig. Action upon the case for nuisance, (B).

(*d*) Rosewell v. Prior, 1 Salk. 460. 4 T. R. 320. Where the injury is originally a trespass, see Coventry v. Stone, 2 Stark. N. P. C. 534. *Ante*, p. 353.

(*e*) Coupland v. Hardingham, 3 Camp. N. P. C. 398.

(*f*) Leslie v. Pounds, 4 Taunt. 649. Payne v. Rogers, 2 H. Bl. 350.

(*g*) Wilson v. Peto, 6 B. Moore, 47.

Against whom.

only be maintained against the occupier and not against the owner of the fee who is not in possession. (*a*)

Where persons in the exercise of a public duty, as commissioners of sewers, or trustees of roads, do some act within their jurisdiction, which is in fact a nuisance to the property of the plaintiff, yet no action will lie (*b*), but if the commissioners act in an arbitrary and oppressive manner they are answerable (*c*); and so if they exceed the authority entrusted to them (*d*), or act carelessly and negligently. (*e*)

A company which has been entrusted by the legislature with the execution of a power from which mischief may result to the public, is bound to take especial precaution to guard against such mischief, and in default is responsible in damages. (*f*)

An action on the case for disturbance of common may be brought either against a stranger or against another commoner, or the lord who has surcharged the common. (*g*)

Of the declaration.

In actions against wrong doers for a disturbance in the possession of corporeal or incorporeal hereditaments, it is not necessary to allege in the declaration the precise estate of which the plaintiff is seised, or to lay any title either by grant or prescription to the thing in the enjoyment of which he is disturbed. (*h*) It is, indeed, highly improper to state the particulars of the plaintiff's title, for if it be defectively set out it will be demurrable, and if it be defective itself, it will not be aided by verdict. (*i*)

Nuisance to houses and land.

In an action for a nuisance to a house, therefore, it is sufficient

(*a*) Cheetham v. Hampson, 4 T. R. 318.

(*b*) Plate Glass Company v. Meredith, 4 T. R. 794. Sutton v. Clarke, 6 Taunt. 43, 2 Barn. and Cres. 707. 2 Bing. 162. Harris v. Baker, 4 M. and S. 27. Boulton v. Crowther, 2 B. and C. 703.

(*c*) Leader v. Moxon, 3 Wils. 461, recognised, 6 Taunt. 43. Boulton v. Crowther, 2 B. and C. 707.

(*d*) See Boulton v. Crowther, 2 Barn. and Cres. 709, 710. Plate Glass Company v. Meredith, 4 T. R. 796.

(*e*) Jones v. Bird, 5 Barn. and Ald. 837. Boulton v. Crowther, 2 Barn. and C. 711. Whether the rule of *respondeat superior* applies to persons acting in a public employment, see Hall v. Smith, 2 Bing. 156.

(*f*) Weld v. Gaslight Company, 1 Stark. N. P. C. 189, and see Matthews v. West London Waterworks' Company, 3 Campb. N. P. C. 403.

(*g*) Atkinson v. Teasdale, 2 W. Bl. 817. 3 Wils. 278, S. C. Smith v. Feverill, 2 Mod. 6. See *post*.

(*h*) 2 Saund. 113, b, notes, 5th edit. Com. Dig. Pleader, (C. 39).

(*i*) Crowther v. Oldfield, 1 Salk. 365. 1 Saund. 228, b, note, 5th edit. 2 Ld. Raym. 1228.

Of the declaration.

to state that the plaintiff was possessed of a certain messuage or dwelling house in which he ought to have so many lights (*a*); nor is it necessary to call the house an ancient house (*b*), or the windows ancient windows. (*c*) So in an action on the case for stopping a watercourse which ought to run to the plaintiff's mill, it is not necessary to state either that the mill was an ancient mill, or that the watercourse was an ancient watercourse. (*d*) Nor is it necessary to prove it an ancient mill, unless it be so laid in the declaration, for then it must be proved, or the plaintiff will be nonsuited. (*e*) In a declaration for stopping a watercourse, it is not sufficient to allege that the defendant prevented the water from flowing to the plaintiff's premises. The plaintiff must state an actual damage accruing from the want of the water. (*f*)

In a declaration against a tithe-owner for not carrying away tithes, it is not necessary to state the mode of setting them out. It is sufficient to say, that they were lawfully, and in due manner set out, and this allegation will be sustained by proof, that they were set out according to an agreement between the parties, varying from the mode prescribed by law. (*g*)

Action in the nature of a *secta ad molendinum.*

It was formerly usual, in an action for not grinding at the plaintiff's mill, to set out the particulars of the plaintiff's title in the declaration (*h*), but it is now held not to be necessary to lay any title to the toll, or consideration for it, or any custom or prescription for the defendant, or the inhabitants or resiants within the manor or other place to grind at the mill; but it is sufficient for the plaintiff, as in other similar actions, to declare generally upon his possession of the mill, by reason whereof he is entitled to the toll and multure of the corn and grain ground at the mill, and that the defendant dwells in such a house, and *ought* to grind all his corn and grain, spent ground in his house at the plaintiff's mill. (*i*) Thus where, in an action by a lessee of an ancient mill

(*a*) Villers v. Ball, 1 Show. 7. Com. Dig. Action upon the case for nuisance, (E. 1). Pleader, (C. 39).

(*b*) Cox v. Mathews, 1 Vent. 237. Com. Dig. *ubi sup.* See *ante*, p. 354.

(*c*) *Ibid.*

(*d*) Sands v. Trefuses, Cro. Car. 575. *Ante*, p. 358.

(*e*) *Per* Holt, C. J. in Heblethwait v. Palme, Carth. 85.

(*f*) Williams v. Morland, 2 B. & C. 917.

(*g*) Facey v. Hurdom, 3 Barn. and Cres. 213, 217. See also Hooper v. Mantle, M'Cleland, 388.

(*h*) Coryton v. Litheby, 2 Saund. 112. Brownl. Rediv. 63. Herne's Pl. 83. Drake v. Wigglesworth, Willes, 657.

(*i*) Drake v. Wigglesworth, Willes, 657. 2 Saund. 113, note, 5th edit.

Of the declaration.

for not grinding there, the declaration stated "that the plaintiff for all the time aforesaid had and ought to have toll of grain and malt ground in the said mill, and that all the inhabitants, being in any ancient messuage within the said manor and borough, of right ought to grind at the said mill all their grain and malt, after the grinding thereof spent in their said messuages, and to pay for the grinding thereof a reasonable toll," and upon not guilty pleaded, there was a verdict, and judgment for the plaintiff in the King's Bench, and upon error brought in the Exchequer Chamber, it was objected, that the plaintiff had not set forth any title, in his declaration, to the toll, or any custom or prescription for the inhabitants of those ancient houses to bring their corn to be ground there; by the opinion of all the court the judgment was affirmed; for it is sufficient to say in this *possessory* action, that during the time aforesaid, *he had, and ought to have* the toll, and that the inhabitants ought to grind. (*a*)

Disturbance of a way.

In an action upon the case for the disturbance of a way, the plaintiff declared, that he was, and still is, lawfully *possessed* of an ancient messuage, with the appurtenances, called C.; by reason whereof, he had, and ought to have, a way through and over the defendant's lands; and that the defendant stopped it up, and obstructed the plaintiff in the use of it. Upon a special demurrer, shewing for cause, that it did not appear by the declaration *how* the plaintiff was entitled to the way, either by prescription or grant, it was objected, that it was said in the declaration, that the defendant was *possessed;* and, also, it appeared by the declaration, that the closes upon which the way was claimed, were the *defendant*'s land; and, therefore, that a title ought to be made either by grant or prescription; though it would have been otherwise, if the action had been against a mere wrong doer; yet, notwithstanding these objections, the court was of opinion, that the declaration was proper, and gave judgment for the plaintiff. (*b*) So in an action for not repairing a private road leading through the defendant's close, it is sufficient for the plaintiff to allege, that the defendant, *as occupier* of the close, is bound to repair it; without shewing by what

(*a*) Chapman v. Flexman, 2 Vent. 286, 292. Drake v. Wigglesworth, Willes, 654. 2 Saund. 113, a, note, 5th edit.

(*b*) Blockley v. Slater, 1 Lutw. 119. Warren v. Sainthill, 2 Vent. 185, 186, S. P. 2 Saund. 114, notes, 5th edit.

right or obligation he is bound. (*a*) In a declaration for a disturbance of a private way, it is necessary to state the *terminus à quo*, and *ad quem;* and if it lead to a private close, to state some interest of the plaintiff therein. And it should also be shewn, whether the way be a *cart*-way, *horse*-way, or *foot*-way. (*b*) Of the declaration.

In a declaration by a commoner, for disturbance of his common, it is not necessary for him to set out any title to the common, either by prescription or otherwise, but only to allege, that he is possessed of certain land, &c.; and, that by reason thereof, he has a right of common in such a place for his commonable cattle *levant* and *couchant* upon his land; and that the defendant disturbed him, whereby he could not enjoy his common in so ample a manner as he ought to have done. (*c*) Disturbance of common.

It is sufficient for the plaintiff to declare upon his possession only, as well against a commoner as a stranger; but upon the general issue, he must prove a right of common at the trial; however, he need not prove the title to the same extent as he has set it out in the declaration, for the disturbance is the gist of the action, and the title is only inducement. (*d*) Thus, if the plaintiff states in his declaration, that he was possessed of a messuage, and so many acres of land, with the appurtenances, and by reason thereof ought to have common, &c., this allegation is divisable, and he may prove that he was possessed of the land only, and entitled to a right of common in respect of such land (*e*). To the allegation, that by reason of his possession the plaintiff has a right of common in such a place, for his commonable cattle *levant* and *couchant* upon his land, the words, "as to the said land, &c. belonging and appertaining," are frequently added; but this seems, in all cases, unnecessary. (*f*) Although from the limited extent of the common, it may not be sufficient to support all the cattle which the plaintiff is entitled to

(*a*) Rider v. Smith, 3 T. R. 766.

(*b*) Com. Dig. Action on the case for disturbance, (B. 1). Allen v. Ormond, 8 East, 4. Parke v. Stewsam Noy, 86. Latch, 160, S. C.

(*c*) Crowther v. Oldfield, 2 Ld. Raym. 1230. Atkinson v. Teasdale, 3 Wils. 280. 1 Saund. 346, note, 5th edit. But in a plea justifying under a right of common, the defendant must set out his title specially. Grinstead v. Marlow, 4 T. R. 718. See *post*, in "Trespass."

(*d*) Bul. N. P. 75, 76. 1 Saund. 346, a, note, 5th edit.; and see Ricketts v. Salwey, 2 Barn. and Ald. 360.

(*e*) Ricketts v. Salwey, 2 B. and A. 360. Yarly v. Turnock, Palm. 269.

(*f*) Cowlam v. Slack, 15 East, 115. 1 Saund. 346, new notes, 5th edit.

Of the declaration.

put upon it, yet he may claim it in his declaration as common for *all* his cattle *levant* and *couchant*. (*a*)

The declaration for a disturbance *generally*, is good as well against a commoner as a stranger (*b*); but, in an action against the lord, it is necessary to state a particular *surcharge* (*c*), and to prove it by shewing that there is not a sufficiency of common left for the plaintiff. But in an action against a person who may have put on cattle by the lord's licence, it is otherwise; for the commoner cannot know that the defendant has such a licence, and is therefore entitled to treat him as a stranger. (*d*) An action may be maintained by one commoner against another for a surcharge, although the plaintiff has himself been guilty of a surcharge. (*e*)

Nuisance to a market.

In declaring for a nuisance to a market, it is not necessary to state, that the plaintiff was *seised in fee* of the place in which the market is held; or, that he was seised of an ancient market *as of fee and right;* that he was lawfully possessed of the place in which the market is kept, and of the market, is sufficient. (*f*)

Disturbance in possession of a pew.

In an action for disturbing the plaintiff in the possession of his pew, although it is sufficient, as in similar actions on the case, to state in the declaration, that the plaintiff was *possessed* of the pew; yet the pew must be laid in the declaration as appurtenant to a messuage in the parish. (*g*) Where the action is brought against a stranger, the plaintiff need not state in his declaration that he has repaired the pew; though it is otherwise when the action is brought against the ordinary; in which case, a title or consideration must be shewn in the declaration, and proved; as the building or repairing of the pew. (*h*)

Where the action is brought by the reversioner, for an injury to his reversion, it must be expressly stated in the declaration,

(*a*) Willis v. Ward, 2 Chit. Rep. 297.

(*b*) Atkinson v. Teasdale, 2 W. Blacks. 817. 3 Wils. 278, S. C.

(*c*) Smith v. Feverell, 2 Mod. 6. Hassard v. Cantrell, 1 Lutw. 107. 3 Wils. 290.

(*d*) Smith v. Feverell, 2 Mod. 6. Hobson v. Todd, 4 T. R. 73; and see 1 Saund. 346, b. new notes, 5th edit.

(*e*) Hobson v. Todd, 4 T. R. 71.

(*f*) 2 Saund. 171, c, notes, 5th edit.

(*g*) Stocks v. Booth, 1 T. R. 428. Mainwaring v. Giles, 5 B. and A. 356. 2 Saund. 175, c, notes.

(*h*) Kenrick v. Taylor, 1 Wils. 326. Ashly v. Freckleton, 3 Lev. 73. Com. Dig. Action upon the case for disturbance, (A. 3).

Of the declaration.

or appear by necessary inference, that the thing complained of is of a permanent nature, injurious to the reversion. (*a*)

It is not necessary in these actions, to state the means by which the defendant obstructed, or disturbed the plaintiff in the enjoyment of his property; it is sufficient to state, in general terms, that he obstructed him. (*b*) But if the mode of the obstruction is stated, and the remote cause only is alleged, the plaintiff will not be allowed to give evidence of a consequential cause arising out of that remote cause. (*c*)

In an action on the case for a nuisance to real property, the venue is local (*d*); but it is not necessary to describe the *gravamen* with any local certainty. (*e*)

Of the plea.

The general issue, in actions on the case for nuisance or disturbance, is *not guilty*, under which, every thing which shews, that the defendant only did what he lawfully might do, may be given in evidence, as a licence. (*f*) In an action for disturbance of common, it was formerly usual for the defendant to plead his matter of defence specially; but it is now settled, that he may give it in evidence, under the general issue; thus a right of common in the defendant may be given in evidence under not guilty (*g*)

Of the evidence.

In an action for nuisance or disturbance, the plaintiff, upon the issue of not guilty, must prove: 1, his title; 2, the nuisance, or disturbance; and 3, the damage. (*h*)

Although it is not necessary, in these possessory actions, to lay a title, as was the custom formerly, yet the *title*, or *consideration*, must be proved at the trial, in order to enable the plaintiff to recover (*i*): that is, the plaintiff must prove *his possession* of the land, house, &c., affected by the nuisance, which is a suffi-

(*a*) Jackson v. Pesked, 1 M. and S. 234.

(*b*) 3 Leon. 13. Com. Dig. Action upon the case for disturbance, (B. 1).

(*c*) Fitzsimons v. Inglis, 5 Taunt. 534.

(*d*) Warren v. Webb, 1 Taunt. 379.

(*e*) Mersey and Irwell Navigation v. Douglas, 2 East, 497. And see Jefferies v. Duncombe, 11 East, 226.

(*f*) Winter v. Brockwell, 8 East, 308.

(*g*) Bennet v. Spink, MS. Selw. N. P. 415, 4th edit. 1 Saund. 346, c, note, 5th edit.

(*h*) See Williams v. Morland, 4 D. and R. 583, 591.

(*i*) 2 Saund. 114, b, notes, 5th edit. In case in the nature of a *secta ad molendinum*, the custom must be proved at the trial. Drake v. Wigglesworth, Willes, 657.

Of the evidence.

cient title in these actions. If it be alleged, that *by reason of his possession* the plaintiff is entitled, such an allegation is not supported by evidence of a parol licence, or agreement, by which the defendant permits the exercise of the right in question to the plaintiff, but does not legally grant and annex it to the thing possessed by the plaintiff: the allegation can only be satisfied by evidence of the right being legally appurtenant to the thing possessed, either by shewing an existing grant, or long usage from which a grant is presumed. (*a*) What length of time will afford a presumption of a grant in these cases, has already been stated. (*b*) In an action against a stranger, for disturbing the plaintiff in the possession of a pew, it is not necessary to prove repairs, though it is otherwise where the action is against the ordinary. (*c*) The action being local, the nuisance must be proved to have been committed in the county where the venue is laid (*d*), and the erection or continuance of the nuisance by the defendant; and where it is necessary, a request to abate must be proved, as laid in the declaration. (*e*)

In an action on the case by a reversioner, for an injury done to his inheritance by a stranger, the tenant in possession is a competent witness to prove the injury. (*f*)

In action for disturbance of common.

The plaintiff in an action for a disturbance to his common, as it has been already stated, may declare on his possession generally; but, at the trial upon the general issue, he must prove a right of common, or he will be nonsuited. (*g*) If the plaintiff should set out a title in his declaration, he need not prove the precise title at the trial, the disturbance being the gist of the action. (*h*) It is sufficient to prove the ground of action laid in the declaration, although it be not to the extent there stated. Thus if the allegation is, that the plaintiff was entitled to the right of common, in respect of a certain quantity of land, and the proof is in respect of a part only of that land, it is sufficient. (*i*) And so if it is alleged to be in respect of a messuage

(*a*) Fentiman v. Smith, 4 East, 107.

(*b*) *Ante*, p. 371; and see 1 Phill. Evid. 151, 6th edit.

(*c*) Kenrick v. Taylor, 1 Wils. 326. *Ante*, p. 376.

(*d*) Warren v. Webb, 1 Taunt. 379. Where a local description is only venue, see 2 East, 497. 5 Taunt. 789.

(*e*) See *ante*, p. 373.

(*f*) Doddington v. Hudson, 1 Bingh. 257.

(*g*) *Ante*, p. 377.

(*h*) Bul. N. P. 75.

(*i*) Eardley v. Turnock, Cro. Jac. 629. Palmer. 269, S. C. Bull. N. P. 60.

and so many acres of land, and is proved to be only in respect of the land. (*a*) The proof in these cases, is not of a different allegation, but of the same allegation in part, and that is sufficient. (*b*) A claim of common for all the plaintiff's cattle, *levant* and *couchant* on his land, is supported by evidence of a custom, for all the occupiers of a large common field to turn cattle into the whole field, when the corn is taken off, the number of the cattle being regulated by the extent of each man's land in the field, although the cattle were not actually maintained on such land during the winter. (*c*) Of the evidence.

Where the action is brought against a stranger, evidence of the smallest damage is sufficient to entitle the plaintiff to a verdict. (*d*) But in an action against the lord, a surcharge of the common must be alleged in the declaration (*e*); and such allegation must be proved by shewing, that there is not a sufficiency of common left for the commoner. (*f*) Where the lord has licensed a third person to put in his cattle, it seems, that such person, in an action brought against him for a disturbance of the common, must not only shew the licence, but must go further and shew that he has not exceeded the licence, but has left a sufficiency of common for the plaintiff. (*g*)

Where a right of common is claimed by custom, one who claims under the same custom cannot be a witness in support of the plaintiff's claim, for he may afterwards use the verdict in his own cause, to establish a similar customary right in himself. (*h*) But where the issue does not affect any common right, but is merely on a right of common claimed by prescription, as belonging to the estate of A.; one who claims a prescriptive right of common, in right of his own estate, may be a witness. (*i*) It seems, that a commoner who claims common, *pur cause de vicinage*, is not a competent witness to support a similar right in another. (*k*) Witnesses incompetent.

(*a*) Ricketts v. Salwey, 2 B. and A. 360. *Ante*, p. 377.

(*b*) 2 B. and A. 366. 1 Phil. Evid. 201, 6th edit.

(*c*) Cheesman v. Hardham, 1 B. and A. 706. And see Corbet's case, 7 Rep. 5, b.

(*d*) Pindar v. Wadsworth, 2 East, 154. Hobson v. Todd, 4 T. R. 74. Wells v. Watling, 2 W. Bl. 1233. 1 Saund. 346, b. (n), 5th edit.

(*e*) *Ante*, p. 378.

(*f*) 1 Saund. 346, b, note, 5th edit.

(*g*) *Ibid.* new notes.

(*h*) Walton v. Shelley, 1 T. R. 302. Bul. N. P. 283. 1 Phil. Evid. 53, 6th edit.; and see Anscombe v. Shore, 1 Taunt. 261.

(*i*) Harvey v. Collison, MS. Selw. N. P. 412, 4th edit. 1 Phil. Evid. 55, 6th edit.

(*k*) 1 Phil. Evid. 55, 6th edit.; but see Gilb. Evid. 109.

Of the evidence.

Evidence of hearsay.

To prove a customary right of common, declarations as to the common opinion of the place, made by deceased persons, who from their situation had the means of knowledge, and no interest to misrepresent, are evidence. (*a*) But the evidence must be confined to what such old persons have said, as were in a situation to know what the rights were: and before a customary right can be proved by such evidence, a foundation ought to be laid by shewing an exercise of the right, or acts of enjoyment, within the period of living memory; it is the exercise of the right, which lets in the evidence of reputation. (*b*) But though the general opinion of the place is evidence, yet the tradition of a particular fact, as that turf was dug, &c., is not. (*c*)

Whether hearsay evidence is admissible to prove a prescriptive right strictly private, is an unsettled question. (*d*) In a late case, the court of King's Bench admitted evidence of reputation to prove a prescriptive right in the plaintiff, which was an abridgment of a general right of common over a waste, and affected a large number of occupiers within the district. (*e*)

(*a*) 1 Phil. Evid. 236, 6th edit.

(*b*) Weeks v. Sparke, 1 M. and S. 689, 690. Doe dem. Foster v. Sisson, 12 East, 65. Morewood v. Wood, 14 East, 330. 1 Phil. Evid. 237, 6th edit.

(*c*) R. v. Inhab. of Eriswell, 3 T.R. 709. Weeks v. Sparke, 1 M. and S. 687. 1 Phil. Evid. 238, 6th edit.

(*d*) In Morewood v. Wood, 14 East, 327, the Court of K. B. was equally divided. See the authorities collected by Mr. Phillipps. 1 Evid. 239, 6th edit.

(*e*) Weeks v. Sparke, 1 M. and S. 691. See City of London v. Clarke, Carth. 181.

Action on the Case in the Nature of Waste.

In modern practice, the old writ of waste had been almost entirely superseded by the action on the case in the nature of the writ of waste. The effect of it is the same as that of a writ of waste in the *tenuit*, brought after the term is expired, in which the plaintiff has judgment to recover damages for the waste done, but not the place wasted. (*a*) Although the plaintiff cannot in this action recover the place wasted, yet this defect is remedied where the demise is by deed, by reserving to the lessor a power of re-entry, in case the lessee commit waste or destruction, so that an action of ejectment, and on the case, now supply the place of the old writ of waste in the *tenet*. This form of action presents several advantages over the ancient mode of proceeding, as it may be maintained by him in the remainder for *life*, or *years*, as well as by the owner of the inheritance (*b*), and the plaintiff is entitled to costs, which, as already stated, are not recoverable in an action of waste. (*c*) This action did not at first prevail in the courts without some difficulty. (*d*)

An action on the case is therefore at the present day, the usual remedy for waste, but from some recent decisions, it is doubtful whether it can be maintained for *permissive* waste only. In the case of Gibson v. Wells (*e*), which was an action on the case against a person who is stated in the report to have been tenant at will to the plaintiff (*f*), the injuries proved amounted only to permissive waste, and Sir James Mansfield, C. J. nonsuited the plaintiff, saying, that although an action on the case in the nature of waste, might be maintained for *commissive* waste, yet that he had never known an instance of such an action being maintained for *permissive* waste only, and on a motion for a new trial, he added, that an action on the case

(*a*) *Ante*, p. 123. What acts amount to waste have been already stated. *Ante*, p. 113, to p. 121.

(*b*) 2 Saund. 252, notes, 5th edit.

(*c*) *Ante*.

(*d*) Jefferson v. Jefferson, 3 Lev. 130. 2 Saund. 252, a, notes, 5th edit.

(*e*) 1 Bos. and Pul. N. R. 290.

(*f*) The first count of the declaration stated the defendant to hold "for a certain term, not yet determined."

might be maintained for wilful waste, but that at common law, if any part of the premises are suffered to be dilapidated, it amounts to permissive waste, and that if that action were maintainable, such an action might be brought against *a tenant at will*, who omitted to repair a broken window. In the case of Herne v. Benbow (*a*), the plaintiff declared in case, and alleged, that certain buildings in the defendant's occupation were ruinous, prostrate, and in decay, for want of needful and necessary reparations. The defendant had suffered judgment by default, and very small damages having been given, on motion to set aside the inquisition, the court said, that, if that action could be maintained, a lessor might declare in case for not occupying in an husband-like manner, which could not be. That the facts alleged were permissive waste, for which an action on the case did not lie, and the countess of Shrewsbury's case (*b*) was cited. In Jones v. Hill (*c*), the plaintiff declared in case, and stated, that the defendant held certain messuages as tenant to him for the remainder of a term of years, upon condition to repair and leave the premises in as good plight and condition as the same were in, when finished under the direction of a surveyor; and the breach was for not repairing during the term, and for yielding up the premises in much worse order than when the same were finished under the direction of a surveyor. There were also two other counts, stating facts which amounted to permissive waste. According to the report of this case in Taunton, Gibbs, J. C. appears to have refused to give an opinion on the general question, whether an action on the case will lie for permissive waste; stating, that it could not be waste, to omit to put the premises into such repair as A. B. had put them into.

Of the above cited cases, it is apprehended, that that of Herne v. Benbow alone establishes the position, that an action on the case cannot be maintained against *a tenant for years* for permissive waste. In Gibson v. Wells, it is expressly stated in the report, that the defendant was *tenant at will*, who is certainly not answerable in any manner in an action of waste, not being included in the statute of Gloucester (*d*). This point was determined in the countess of Shrewsbury's case (*e*), but it was

(*a*) 4 Taunt. 764.
(*b*) 5 Rep. 13 Cro. Eliz. 777, 784, S. C.
(*c*) 7 Taunt. 392. 1 B. Moore, 100, S. C.
(*d*) See *ante*, p. 113.
(*e*) 5 Rep. 13 b.

at the same time observed, in that case, that if tenant at will committed voluntary waste, as by cutting down trees, &c. he would be answerable in an action of trespass. (*a*) In the case of Herne v. Benbow (*b*), it may be collected, that the defendant was tenant for years, but the rule there laid down, "that an action on the case does not lie against *a tenant* for permissive waste," is certainly not borne out by the authority cited in support of it (*c*), which only shews, that such an action cannot be maintained against a *tenant at will*. The case of Jones v. Hill (*d*), is by no means clearly reported. It appears from the report in Taunton, that the declaration contained two counts, charging the defendant with permissive waste, but no mention of those counts is made in Moore, and Mr. Taunton adds in a note, that he could not collect whether the court expressed any decided opinion on those counts, on which the counsel did not much dilate, but which had no reference to the repairs done by the surveyor. In neither report is the evidence stated, but from the expressions made use of by Gibbs, C. J., it seems that it only appeared in evidence, that the defendant had neglected to leave the premises in as good plight and condition as they were in when finished under the direction of a surveyor, and that no evidence of negligence, amounting to permissive waste, was given, which must have brought the second and third counts into question. Should the case bear this construction (*e*), it proves nothing more than that, where a tenant for years enters into an engagement, which extends his liability to repair beyond the limits to which he was made answerable by the statute of Gloucester, and the plaintiff declares in case for an injury *commensurate with such extended liability*, such an action cannot be maintained by the plaintiff, who must resort to his remedy upon the covenant or agreement. (*f*)

Where the lessee covenants not to do waste, the lessor has his election, either to bring an action on the case or of covenant,

(*a*) See *ante*, p. 113.

(*b*) 4 Taunt. 764.

(*c*) Countess of Shrewsbury's case, 5 Rep. 13, b.

(*d*) 1 B. Moore, 100, but *quære*, how the other counts, stated in 7 Taunt. 392, were disposed of.

(*e*) But see 1 Saund. 323, b, (note k) 6th edit.

(*f*) Tenant from year to year, is only bound to make fair and tenantable repairs, but not substantial repairs, such as putting on a new roof. Ferguson v. —— 2 Esp. N. P. C. 590. Horsefall v. Mather, 1 Holt's N. P. C. 7. The mere relation of landlord and tenant is a sufficient consideration to support a promise to use the premises in an husband-like manner, Powley v. Walker, 5 T. R. 373. See 1 Marsh. 567.

against the lessee, for waste done by him during the term (*a*). And where a landlord has given his tenant notice to quit, and the latter holds over after the expiration of the notice, and commits waste, the landlord may either treat him as a trespasser, or may waive the trespass, and bring an action on the case in the nature of waste. (*b*)

Declaration.

It does not appear to be necessary in this action, whether it be brought by the original lessor, or by his heir or assignee, to state any title in the declaration, and indeed it is better not to set out the estate which the plaintiff has in the remainder or reversion, for if it be incorrectly stated, the variance will be fatal. (*c*)

But it seems necessary in an action on the case, as well as in an action of waste, to state in the declaration, the nature and kind of waste which is the subject of the action, and the plaintiff will not be permitted to give evidence of a different sort of waste from that which is laid in the declaration. (*d*) If, for instance, the plaintiff charges the defendant with permissive waste, he cannot give evidence of voluntary waste committed by him; so if the defendant is charged with uncovering the roof of a dwelling-house, the plaintiff cannot give in evidence, that the defendant removed some fixtures from it; just as if the breach assigned in an action of covenant should be, "that the defendant had not used the demised premises, or any part thereof, in a good and husband-like manner; but, on the contrary thereof, had committed, permitted, and suffered to be made, done, and committed, in and upon the said demised premises, waste, spoil, and destruction;" the plaintiff will not be allowed to give evidence of the defendant's using the farm in an unhusband-like manner, unless it amounts to waste (*e*); for though the evidence would have been admissible on the former part of the breach, yet, as the plaintiff has in the subsequent part of it narrowed it to waste, spoil, and destruction, it is not competent to him to give evidence of any other particulars, which do not come within the meaning of these words. It is true, that the plaintiff is not bound to prove the whole waste stated, nor is there any necessity for the jury to find the particular circumstances of the waste, as in an action for waste, because there, the plaintiff is to have

(*a*) Kinlyside v. Thornton, 2 Blacks. 1111.

(*b*) Burchell v. Hornsby, 1 Campb. N. P. C. 360.

(*c*) Hardwicke v. Thompson, MS. 2 Saund. 252, c, (note) 5th edit.

(*d*) 2 Saund. 252, c, (note) 5th edit.

(*e*) Harris v. Mantle, 3 T. R. 307.

seisin of the place wasted; nor to find a verdict for the defendant for so much of the waste as the plaintiff does not prove, for in this action the plaintiff only goes for damages, and the jury may assess them generally; but yet the plaintiff is bound to set out the nature, quantity, and quality, of the waste, that the defendant may be apprised of the charge, and prepared for his defence. (*a*)

(*a*) Serjt. Williams's note, 2 Saund. 252, c, 5th edit.

Action on the Case for Dilapidations.

ANALOGOUS to the action on the case for waste, is the action on the case for dilapidations, which may be maintained by a rector against his predecessor, or the executors of his predecessor, on the custom of England (*a*); and an action for dilapidations of a prebendal house may be brought by a succeeding prebendary against his predecessor. (*b*) But a curate, though he receive the tithes by licence or agreement, and have an allowance for the repairs of the parsonage house, &c. yet being but at will, and not coming in by institution and induction, is no incumbent, and his executors, &c. cannot be sued or charged in the spiritual court for dilapidations. (*c*)

When the premises on which the dilapidations are alleged to have been committed, have been devised to certain persons in trust, to permit the vicar for the time being, to receive the rents and profits, (the expenses for necessary reparations being first deducted,) the common law obligation on the vicar does not attach, the donor of the premises in question having distinctly provided for the necessary repairs in another way. (*d*) And where the premises were copyhold, and devised to certain trustees in the above manner, and the plaintiff declared that the defendant was seised in right of his vicarage of the premises in question, it was held, that the above circumstances were not proof of such a seisin as would maintain the action. (*e*) In an action for dilapidations, where it appeared that successive rectors had been in possession of the land for above fifty years past, but that the absolute seisin in fee of the same land was in certain devisees, since the statute 9 Geo. 2, c. 36, and that no conveyance was enrolled according to the first section of that act, nor any disposition of it made to any college, &c. according to the fourth section, it was held, that no presumption could be

(*a*) Jones v. Hill, 3 Lev. 268. Wats. Clerg. Law, 409, 2 Burn's Eccles. Law, 153. Sollers v. Lawrence, Willes, 421.

(*b*) Radcliffe v. D'Oyley, 2 T. R. 630.

(*c*) Pawley v. Wiseman, 3 Keb 614. Wats. Clerg. Law, 409, but see 2 Burn's Eccl. Law, 153.

(*d*) P. Park, J. in Browne v. Ramsden, 8 Taunt. 565.

(*e*) Browne v. Ramsden, 8 Taunt. 559. 2 B. Moore, 612, S. C.

made of any such conveyance enrolled, (which if it existed, the party might have shewn) and consequently that the rector had no title to the land, and could not recover for the dilapidations, as the statute avoids all other grants, &c. in trust for any charitable use made otherwise than is thereby directed, although in fact, it appeared, that one of the devisees was the then rector, and that the title to the rectory was in Baliol college, Oxford. (*a*)

The successor of a rector may have separate actions against the executor of his predecessor for dilapidations to different parts of the rectory. They are different and independent injuries in respect of the different parts; the injury from the dilapidations of the house is one thing, that from the dilapidations of the chancel is another, and the causes are distinct. (*b*)

The plaintiff in his declaration must state a title, and if he entitle himself by the resignation of his predecessor, he ought to show *how* the resignation was made. (*c*)

(*a*) Wright v. Smythies, 10 East, 409.
(*b*) Young v. Munby, 4 M. & S. 183.
(*c*) 1 Lutw. 116.

Action on the Case for Slander of Title.

WHERE a man falsely and maliciously speaks and publishes of another words which tend to disinherit him (*a*), or to deprive him of his estate (*b*), an action on the case may be maintained for such injury; but, in order to support such an action, some special damage must have been sustained, for the words are not actionable in themselves. (*c*) If a man publishes a lease which he himself has, and which he knows to be counterfeit, for a true lease, an action will lie. (*d*) And so though the words are spoken to a stranger, and not to the intended purchaser (*e*); and though the party has a remedy against the person who has wrongfully disturbed him in his possession, in consequence of the slander. (*f*)

If the words themselves appear not to impeach the title, an action will not lie. Thus if the plaintiff declare that A. by fine settled land upon himself for life, remainder to his first son thereafter to be begotten in tail, remainder to the plaintiff; and, that the defendant, after the death of A., in slander of his remainder said, *that B. is the lawful son of A., begotten after his marriage, ubi revera* he is not so, an action on the case does not lie, for if he was his son after marriage, yet, unless he was born after the fine levied, it is no prejudice to the plaintiff's remainder. (*g*)

(*a*) 1 Rol. Ab. 37, l. 27. Com. Dig. Action on the case for Defam. (C. 1) (D. 11).

(*b*) Bois v. Bois, 1 Lev. 134. 1 Sid. 214, S. C.

(*c*) Tasburgh v. Day, Cro. Jac. 484. Gerard v. Dickenson, Cro. Eliz. 197. Lawe v. Harwood, Cro. Car. 141. Com. Dig. Action on the case for Defam. (C. 2). 2 Saund. 117, note, 5th edit. But in Elborough v. Allen, 2 Rol. Rep. 248, it was held to be actionable to call a man a bastard, without shewing special damage. Doddridge, J. *Diss.* Com. Dig. Action on the case for Defam. (D. 11); and see Bois v. Bois, 1 Lev. 134, and Humphreys v. Stanfield, Cro. Car. 469. See also May v. Hodge, 2 Ld. Raym. 1287.

(*d*) Gerard v. Dickenson, 4 Rep. 18, a. Cro. Eliz. 197, S. C.

(*e*) Williams v. Linford, 2 Leon. 111.

(*f*) *Per* Hale, C. Justice, Newman v. Zachary, All. 3. Com. Dig. Action on the case for Defam. (C. 1).

(*g*) Booth v. Trafford, Dal. 103. Com. Dig. Action upon the case for Def. (C. 2).

To maintain this action, the slander must be such as goes directly to defeat the plaintiff's title. (*a*)

This action will, it is said, lie by an heir apparent, who has an expectancy which is endangered by the words (*b*); or by a younger son, who, on the death of his elder brothers without issue, would be entitled under an entail. (*c*)

It should seem, that two jointenants, or coparceners, may join in an action of slander of their title to their estate; for as it must be shewn in the declaration, and proved, that the plaintiffs received some particular damage, by reason of the slander, the damage, as well as the interest in the estate, is joint. (*d*)

In order to sustain this action, there must be malice either express or implied (*e*), for malice is the gist of the action. (*f*) Therefore, where the defendant speaks the words *bonâ fide*, claiming an interest in the property, no action will lie; for otherwise, no one would be able to make a claim or title to land, or begin any suit, or seek advice, or counsel, without subjecting himself to an action. (*g*) And this rule extends to the agent or attorney of the party so *bonâ fide* claiming an interest, who delivers a message sent by his client, if he does not vary in any material point from the words used by his client. (*h*) And where the words are spoken by a counsel, or attorney, to his client, who advises with him upon the purchase, they are not actionable. (*i*) But, unless the party making use of the slanderous expressions, acted under the direction of the person interested, an action will lie. (*k*) The rule, that no action can be maintained where the defendant claims an interest, will not extend to the case where he knows that he has no title, but maliciously asserts that he has. (*l*)

(*a*) *Per* Ld. Mansfield, in Hargrave v. Le Breton, 4 Bur. 2425.

(*b*) Humphrys v. Stanfield, Cro. Car. 469. 1 Rol. Ab. 58, l. 5, 15. Com. Dig. Action on the case for Def. (D. 11); but *quære* as to special damage. See *post*.

(*c*) Vaughan v. Ellis, Cro. Jac. 213. In this case there was special damage.

(*d*) Sergt. Wms. note. 2 Saund. 117, 5th edit.

(*e*) Hargrave v. Le Breton, 4 Burr. 2422.

(*f*) *Per* Lawrence, J. in Smith v. Spooner, 3 Taunt. 255.

(*g*) Gerard v. Dickenson, 4 Rep. 18, a. Cro. Eliz. 197, S. C.

(*h*) Hargrave v. Le Breton, 4 Bar. 2422.

(*i*) Johnson v. Smith, Hoor, 187. Com. Dig. Action on the case for Defam. (C. 2).

(*k*) Rowe v. Roach, 1 M. and S. 304.

(*l*) *Per* Mansfield, C. J., in Smith v. Spooner, 3 Taunt. 251. Gerard v. Dickenson, 4 Rep. 18, a. Cro. Eliz. 197, S. C.

It is not necessary that the defendant should actually have an interest in the land; if he supposes himself to have an interest, it is sufficient to excuse the speaking of the words. (*a*) A lease, in which was a proviso for re-entry, if the rent were in arrear twenty-eight days, being exposed to sale by the assignee, and rent being then in arrear, the lessor announced at the sale, that the vendors could not make a title, in consequence of which, bidders who came to buy, went away. The lessor, afterwards, offered 100*l.* for the lease, but subsequently recovered the premises in ejectment; it was held, that no action for slander of title lay against him. (*b*) So in an action for slander of title conveyed in a letter to a person about to purchase the estate of the plaintiff, imputing insanity to Y. from whom the plaintiff purchased it, and that the title would therefore be disputed *per quod* the person refused to complete the purchase, it was held, that the defendant, who had married the sister of Y., who was heir at law to her brother in the event of his dying without issue, was not to be considered as a mere stranger, and that the question for the jury was, not whether they were satisfied as men of good sense and good understanding, that Y. was insane, or that the defendant entertained a persuasion, that he was insane, upon such grounds as would have persuaded a man of sound sense and knowledge of business, but whether he acted *bonâ fide* in the communication which he made, believing it to be true, as he judged according to his own understanding, and under such impressions as his situation and character were likely to beget. (*c*)

Declaration.

The declaration commences with an allegation of the plaintiff's title to the land. (*d*) And where it stated, that the plaintiff was *lawfully possessed* of certain mines and ore gotten, and to be gotten from them, it was held sufficient, unless upon special demurrer. (*e*) Where the slander is contained in an advertisement, it seems sufficient to allege, that the defendant published a malicious, injurious, and unlawful advertisement, without using the word *false*. (*f*) The declaration must allege some special damage, as, that by the speaking of the words the plaintiff could

(*a*) Gerard v. Dickenson, 4 Rep. 18, a.

(*b*) Smith v. Spooner, 3 Taunt. 246.

(*c*) Pitt v. Donovan, 1 M. and S. 639.

(*d*) See forms, 3 Chitty's Pl. 361. 8 Went. 297.

(*e*) Rowe v. Roach, 1 M. and S. 304.

(*f*) *Ibid.*

not sell or let the lands; for without special damage this action will not lie. (*a*) And it is not sufficient to state an intent to make a voluntary settlement, in which the plaintiff has been hindered by the speaking of the words. (*b*) To allege by way of special damage, that the plaintiff has lost the sale of his lands, is too general. (*c*)

Plea.

Where the defendant has spoken the words, claiming an interest in the property, or as the agent of a person claiming an interest, he need not plead this matter specially, but may give it in evidence, under the general issue. (*d*)

Evidence.

The plaintiff must be prepared to prove malice, which is the gist of the action. (*e*) And where a person who is not a mere stranger, is sued in an action of this kind, two things are to be made out: first, that there is a want of probable cause; and, secondly, that the party who made the communication acted maliciously. (*f*) As the action cannot be maintained where the defendant speaks the words *bonâ fide* claiming an interest, although in fact he is not interested, it is not necessary for him to prove any title. (*g*) The interest or estate of the plaintiff in the property, concerning which the words are spoken, must be proved as averred; and, therefore, where it appeared by the declaration, that the plaintiff had a certain interest in the premises, and that by an agreement between himself and the defendant, from whom he derived that interest, he had a clear right to dispose of the whole of that interest; but only a doubtful right to dispose of any portion of it; and the plaintiff averred, that he put up his said interest to auction, and that the defendant published a libel of, and concerning, his right to sell the *said interest*, the evidence being, that he offered for sale a portion of that interest only, it was held, that this was a fatal variance. (*h*) As the action is not sustainable without special

(*a*) *Ante*, p. 390.

(*b*) Smead v. Badley, Cro. Jac. 397. 1 Rol. Rep. 244 S.

(*c*) Lowe v. Harewood, Sir W. Jones, 196.

(*d*) Hargrave v. Le Breton, 4 Burr. 2422. Smith v. Spooner, 3 Taunt. 255.

(*e*) *Per* Lawrence, J. in Smith v. Spooner, 3 Taunt. 255.

(*f*) *Per* Bayley, J. in Pitt v. Donovan, 1 M. and S. 649.

(*g*) *Per* Mansfield, C. J. in Smith v. Spooner, 3 Taunt. 255.

(*h*) Millman v. Pratt, 2 Barn. and Cres. 486. It should be observed, that this was an action against a party who was interested in the premises and not a mere wrong doer.

damage, the plaintiff must prove such damage as stated in his declaration. (*a*) And he will be entitled to costs, though the damages are under 40*s*. for this action is not within the statute 21 Jac. c. 16. (*b*)

(*a*) Browne v. Gibbons, 1 Salk. 206. (*b*) *Ibid.* Lawe v. Harwood, Cro. Car. 141.

Assumpsit on Sale of Real Property.

Vendor v. Vendee.

If the vendee of real property refuse to perform the contract, an action of assumpsit, if the contract is not under seal, will lie against him for the breach of it.

Agreements for sale of lands within the statute of frauds.

By the fourth section of the statute of frauds, 29 C. 2, c. 3, no action shall be brought, whereby to charge any person upon any contract or sale of lands, tenements, or hereditaments; or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised. (*a*)

What interests are within the statute.

An agreement for a mere easement in lands or tenements, or a licence to be exercised on lands, as a licence to stack coals (*b*), a licence to occupy a box at the opera (*c*), or a licence to put a skylight over the defendant's area, whereby the plaintiff's window is darkened (*d*), is not within the statute. An agreement for the purchase of a crop of mowing grass growing in a close of the defendant, the grass to be mowed and made into hay by the plaintiff, and no time fixed for the commencement of the mowing, was held to be a contract for the sale of an interest in or concerning land; and, therefore, within the statute. (*e*) So where growing turnips were sold, but no particular time was stated for their removal, nor did it appear what the degree of their maturity was, the court held it to be a sale of interest in land, within the statute. (*f*) But in another case, where one party agreed to sell another a crop of potatoes in a close, at so much the sack, to be got immediately, the court considered the contract to be confined to the sale of the potatoes, and that it did not convey an interest in the soil, but merely an ease-

(*a*) See Mr. Sugden's remarks on this clause, Law of Vend. and Purch. 65, 6th edit.

(*b*) Wood v. Lake, Say. 3. Webb v. Paternoster, Palm. 71. 2 Rol. Rep. 152, S. C.; but see Sugd. V. and P. 69. 6th edit. 2 Phil. Evid. 64, (n), 6th edit.

(*c*) Tayler v. Waters, 7 Taunt. 374. 2 Marsh. 551, S. C.

(*d*) Winter v. Brockwell, 8 East, 308.

(*e*) Crosby v. Wadsworth, 6 East, 602. 2 M. and S. 208. 11 East, 366.

(*f*) Emerson v. Heelis, 2 Taunt. 38.

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ment. (*a*) So where the contract was for all the potatoes *then growing* on a certain quantity of land, at so much per acre, to be dug and carried away by the purchaser, the court held, that the potatoes were the subject matter of the sale, and that the contract was for a mere chattel. (*b*)

The agreement.

The word *agreement*, used in the statute, must be understood in its proper and correct sense, and the *consideration* of the promise therefore, which is part of the agreement, must be in writing as well as the promise itself. (*c*) A letter, therefore, by one of the contracting parties, admitting that he has made a parol agreement, but not specifying the terms, is not sufficient to charge him. (*d*) Nor can the agreement be enforced, unless both the contracting parties are named in it. (*e*) It is not necessary that all the terms or essential parts of the agreement should be contained in a single paper. The statute only enacts, that they shall be in writing, and does not require them to be specified by a single instrument. It is, therefore, the common practice to establish contracts by the evidence of several writings; and those writings need not be contemporaneous with the contract. They ought, however, to be connected, or to have a plain reference to each other by their context, or at least by writing; they cannot be connected by mere parol evidence. (*f*) But where the agreement refers to another writing, parol evidence may be admitted to prove the identity of the writing. (*g*) If a letter be relied upon to complete an agreement, it must recognise and adopt it; for, if it falsify the contract, proved by the parol testimony, it will not take the case out of the statute. (*h*)

The statute expressly requires the agreement or the memorandum or note of it *to be signed*. The object of the signing is to

(*a*) Parker v. Staniland, 11 East, 362.

(*b*) Warwick v. Bruce, 2 M. and S. 205. 1 B. and C. 25.

(*c*) Wain v. Warlters, 5 East, 10. Saunders v. Wakefield, 4 B. and A. 595. Jenkins v. Reynolds, 3 B. and B. 14.

(*d*) Seagood v. Meale, Prec. Ch. 560. Rose v. Cunninghame, 11 Ves. 550. Clerk v. Wright, 1 Atk. 12. Sugd. Vend. and Purch. 77, 6th edit.

(*e*) Charlewood v. D. of Bedford, 1 Atk. 497. Champion v. Plummer, 1 N. R. 252, the latter case on the 17th sec.

(*f*) 2 Phil. Evid. 79, 6th edit. citing 1 Ves. Jun. 396. 1 Scho. and Lef. 33. 9 Ves. 250. 12 Ves. 471. 11 East, 157. Gordon v. Trevelyan, 1 Price, 64. Ogilvie v. Foljambe, 3 Meriv. 61. Hughes v. Gordon, 1 Bligh, 287.

(*g*) Clinan v. Cooke, 1 Sch. and Lef. 33. 12 Ves. 471. Gordon v. Trevelyan, 1 Price, 64. Sug. Vend. and Pur. 79, 6th edit.

(*h*) Cooper v. Smith, 15 East, 103.

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Signature.

authenticate the writing, and therefore it is in general immaterial in what part of the instrument the name is found. (*a*) Whether the writing of his name by the defendant in the body of the instrument for a particular purpose (as stating a rent to be paid to himself) be a sufficient signing, appears to be doubtful. (*b*) A memorandum of agreement, written by the defendant, with his name printed, will be as binding as if his name were written. (*c*) So it is sufficient if the party knowing its contents sign it as a witness (*d*), and it seems sufficient if the initials of the name are set down. (*e*) The signature of the party may be supplied by reference to a letter or other writing recognising the agreement. (*f*)

The statute also requires the agreement, &c. to be signed *by the party to be charged therewith*, or some other person thereunto, by him lawfully authorised. With regard to the *party* himself, it appears to be settled that a memorandum of agreement, naming both parties, but signed only by the party to be charged, will bind such party (*g*); but both the parties must be named in the instrument. (*h*) With regard to the *person authorised* by the parties to sign, it is settled that such person need not be authorised *by writing* (*i*); but such agent must be a third person and not one of the parties. (*k*) An auctioneer is the agent of the seller (*l*), and of the purchaser also (*m*) within the

(*a*) Ogilvie v. Foljambe, 3 Meriv. 62. Allen v. Bennet, 3 Taunt. 169. Knight v. Crockford, 1 Esp. N. P. C. 190. Saunderson v. Jackson, 2 Bos. and Pul. 239.

(*b*) Stokes v. Moore, 1 Cox, 219. Cox's note, 1 P. Wms. 771. See also 9 Ves. 253. 18 Ves. Jun. 175. 3 Ves. & Beames, 187. Sugd. V. and P. 89, (6th edit.).

(*c*) Saunderson v. Jackson, 2 Bos. and Pul. 239. Schneider v. Norris, 2 Maul. and S. 286. Cases on the 17th sec.

(*d*) Welford v. Beasley, 3 Atk. 503. 9 Ves. 291. See 1 Esp. N. P. C. 57.

(*e*) Phillimore v. Barry, 1 Camp. N. P. C. 513.

(*f*) See the cases collected, Sugd. Vend. and Purch. ch. 3, s. 2, (6th edit.). 2 Phil. Evid. 80, (6th edit.).

(*g*) Hatton v. Gray, 2 Ch. Ca. 164. Cotton v. Lee, 2 Br. C.C. 564. Seton v. Slade. 7 Ves. Jun. 265, Wain v. Warlters, 5 East, 10. Saunderson v. Jackson, 3 Bos. and Pul. 238. Bowen v. Norris, 2 Taunt. 374. Allen v. Bennet, 3 Taunt. 176. Sugd. V. and P. 73, (6th edit.).

(*h*) *Ante*, p. 396.

(*i*) Coles v. Tregothick, 9 Ves. 250. Sugd. Vend. and Purch. 91, (6th edit.).

(*k*) Wright v. Dannah, 2 Campb. N. P. C. 203, on the 17th sec. 5 B. and A. 335.

(*l*) Blagden v. Bradbear, 12 Ves. 471. 7 East, 569.

(*m*) Emmerson v. Heelis, 2 Taunt. 38. White v. Proctor, 4 Taunt. 209, 3 Ves. and Beames, 57. 1 Jac. and Walk. 350. Kenworthy v. Schofield, 2 B. and C. 947.

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statute. But if the action is brought against the purchaser by the auctioneer himself, a signing of the defendant's name by him will not be sufficient to satisfy the meaning of the statute (*a*); nor is a signing by the auctioneer's clerk sufficient, without the consent of the principal. (*b*)

Declaration.

The declaration must state the contract according to the fact, and allege performance by the plaintiff of his part of the contract, or an excuse for the non performance. In one case it was held necessary for the plaintiff, the vendor of an estate, to set forth his title specially in the declaration. (*c*) But in a later case, where in a similar action the plaintiff averred that he was seised in fee of the land, and that the defendant agreed to purchase it on having a good title, and that his title to the land was made good, perfect, and satisfactory to the defendant, and that the plaintiff had been always ready and willing, and offered to convey the lands to the defendant, but that the defendant did not pay the purchase money, it was held on demurrer that such allegations amounted to performance of the agreement on the part of the plaintiff, so as to entitle him to recover. (*d*) Although a vendor cannot bring an action for the purchase money, without having executed the conveyance, or offered to do so, unless the purchaser has discharged him from so doing, (*e*) yet where the defendant became the purchaser of a leasehold estate sold by public auction, and by the conditions of sale it was stipulated that the purchaser should immediately pay down a deposit in part of the purchase money, and sign an agreement for payment of the remainder within twenty-eight days from the day of sale, when possession should be given of the part in hand, and that the purchaser should have proper conveyances and assignments of the leases without requiring the lessor's title, on payment of the remainder of the purchase money; and the declaration stated in the first count, that the plaintiffs gave the defendant possession according to the conditions, and were also ready and willing to give him proper conveyances and assignments of the leases of

(*a*) Farebrother v. Simmons, 5 B. and A. 333.

(*b*) Coles v. Tregothick, 9 Ves. 234. Sugd. Vend. and P. 91, (6th edit.).

(*c*) Phillips v. Fielding, 2 H. Bl. 123, and see Duke of St. Albans v. Shore, 1 H. Bl. 275, 280, and Luxton v. Robinson, Douglas, 620.

(*d*) Martin v. Smith, 6 East, 555.

(*e*) Jones v. Barkley, Dougl. 684. Phillips v. Fielding, 2 H. Bl. 123. Sugd. V. and P. 220, (6th edit.).

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the estate, on payment of the remainder of the purchase money; and in the second count, that the plaintiffs contracted with the defendant to sell, and the defendant to purchase an estate, and that on the plaintiffs having promised the defendant to convey, he promised to accept the conveyance, and to pay the remainder of the purchase money in a reasonable time, and that although the plaintiff were ready and willing, and offered to convey and assign to the defendant, and although a reasonable time had elapsed for accepting the conveyance, yet that the defendant would not accept it, or pay the remainder of the purchase money, it was held on motion in arrest of judgment, that the declaration was sufficient after verdict. (*a*)

The plaintiff may aver that he tendered the draft, and that the defendant discharged him from executing it; or that he tendered the assignment, and that the defendant refused to accept it. (*b*)

It has been usual to aver in the declaration by way of inducement, that the plaintiff was seised in fee, &c. *at the time of the sale* (*c*), but this appears to be unnecessary, for if the purchaser has not made an application for the title before the commencement of the action, and no time is fixed for completing it, it will be sufficient if the vendor show a complete title at the time of the trial. (*d*)

Evidence.

The plaintiff must be prepared to prove the averment of his title as stated in the declaration (*e*); and if the purchaser has not made an application for the title before the commencement of the action, and no time is fixed upon for completing the contract, it will be sufficient if the deeds shew a good title subsisting in the plaintiff at the time of the trial. (*f*) The plaintiff on producing the title deeds will not be compelled to prove their execution by calling the subscribing witnesses. (*g*) In a later case, indeed this doctrine was denied (*h*); but the former decision was not adverted to, and as that decision is understood to coincide

(*a*) Ferry v. Williams, 1 B. Moore, 498. 8 Taunt. 62. S. C.

(*b*) See 2 Phill. Evid. 98. Jones v. Barkley, Dougl. 684. 5 East, 202.

(*c*) Martin v. Smith, 6 East, 555. 2 Wentw. 91.

(*d*) Thompson v. Miles, 1 Esp. N. P. C. 184.

(*e*) 2 Phill. Evid. 98.

(*f*) Thompson v. Miles, 1 Esp. N. P. C. 184.

(*g*) *Ibid.*

(*h*) Crosby v. Percy, 1 Campb. N.P. C. 303.

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with the practice in these cases, it can scarcely be considered as overruled. (*a*)

Under the general issue the defendant may show that the contract is absolutely void on account of fraud practised against him by the plaintiff (*b*), as where the plaintiff has fraudulently misrepresented the quality or value of the property, or wilfully misdescribed its locality, so as to make it appear more valuable. (*c*) Where a person is employed by the plaintiff at the sale, not for the purpose of preventing a sale at an undervalue, but to take advantage of the eagerness of bidders, to screw up the price, it seems that this will be deemed a fraud. (*d*)

The defendant may also shew a defect of title in the vendor, and on that ground rescind the contract (*e*), as where the vendor had an interest in the premises for a shorter term than he contracted to sell (*f*), or where the premises are subject to an incumbrance, or annual payment, of which no notice has been given. (*g*)

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If the vendor refuses, or is unable to complete his contract, the purchaser may bring an action for the non performance, declaring specially upon the contract, or in case he has made a deposit, or paid any part of the purchase money, he may bring an action for money had and received to his use. In the former action, the plaintiff will be enabled to recover the deposit, and also interest, and any expenses to which he may have been put in investigating the title by way of special damage; in the latter, if he declare only for money had and received, he will recover the deposit or purchase money only, and not the expenses to which he has been put, or even interest as it seems (*h*); but in neither form of action can he recover any compensation for the fancied goodness of his bargain, where the vendor is without fraud, in-

(*a*) See Sugd. V. and P. 216, (6th edit.). 2 Phil. Evid. 99, (6th edit.).

(*b*) 2 Phill. Evid. 99, (6th edit.).

(*c*) Duke of Norfolk v. Worthy, 1 Campb. N. P. C. 337. Vernon v. Keys, 12 East, 637.

(*d*) Smith v. Clarke, 12 Ves. Jun. 483. Sugd. V. and P. 24, (6th edit.). Howard v. Castle, 6 T. R. 642.

(*e*) 2 Phill. Evid. 99, (6th edit.).

(*f*) Farrer v. Nightingal, 2 Esp. N. P. C. 639. Hibbert v. Shee, 1 Camp. N. P. C. 113.

(*g*) Turner v. Beaurain, MS. Sugd. V. and P. 252. Barnwell v. Harris, 1 Taunt. 430.

(*h*) Camfield v. Gilbert, 4 Esp. N.P. C. 221. Walker v. Constable, 1 Bos. and Pul. 306. Sugd. Vend. and Purch. 213, (6th edit.). See 2 Stark. Ev. 791.

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capable of making a title. (*a*) To enable the plaintiff to maintain an action for money had and received, the contract must be disaffirmed, *ab initio*. If the purchaser has had an occupation of the premises under the contract, he adopts the contract, and cannot disaffirm it afterwards by quitting the premises, as the parties cannot be put into the same situation in which they before stood; therefore, an action for money had and received cannot be maintained, but the plaintiff must sue upon the special agreement. (*b*)

In order to enable the purchaser to recover the deposit (*c*), or the purchase money paid to the vendor, the plaintiff must prove the title defective, and it will not be enough to prove that it has been deemed by conveyancers to be insufficient. (*d*) The vendor must be prepared to make out a good title on the day on which the purchase is to be completed. If he delivers an abstract, setting out a defective title, the purchaser may object to it; and when the abstract is delivered by the seller, he must be able to verify it by the title deeds in his possession. Unless a good title is made out at the day fixed, the plaintiff will be entitled to rescind the contract and recover the deposit. (*e*) When the property which the plaintiff had purchased, and on which he had paid the deposit, consisted of several parcels which were sold at a public auction in distinct lots, Lord Kenyon held, that as the vendor had given an abstract of the title only to a single lot, and refused to deliver an abstract of the rest, the purchaser might rescind the whole contract; his lordship considering the purchase of the several lots as having been made with a view to a joint concern, and that the contract, for the convenience and interest of the purchaser, must be understood to be one entire contract for the whole. (*f*)

Although it is a question upon which there has been some difference of opinion, yet it seems that a court of law will enter into

(*a*) Flureau v. Thornhill, 2 W. Bl. 1078. Bratt v. Ellis, MS. Sugd. Vend. and Purch. 213, (6th edit.).

(*b*) Hunt v. Silk, 5 East, 449.

(*c*) A deposit is considered as a payment in part of the purchase money. See Sugd. V. and P. 40, 6th edit.

(*d*) Camfield v. Gilbert, 4 Esp. N. P. C. 221.

(*e*) Cornish v. Rowley, MS. Selw. N. P. 170, 4th edit. Berry v. Young, 2 Esp. N. P. C. 640, n. Seaward v. Willock, 5 East, 198. Sugd. Vend. and Purch. 353, 6th edit.

(*f*) Chambers v. Griffith, 1 Esp. N.P. C. 149, but see Emmerson v. Heelis, 2 Taunt. 38. James v. Shore, 1 Stark. 426. Poole v. Shergold, 2 Br. C. C. 118. Sugd. Vend. and Purch. 257, 6th edit.

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equitable objections to a title, and will permit a purchaser to rescind a contract and recover his deposit on that ground. (*a*)

Where the contract has been rescinded on account of the default of the vendor, the purchaser may recover the deposit with interest, and the expenses of investigating the title as special damage. (*b*) If the residue of the purchase money has been lying ready without any interest being made of it, the plaintiff is also entitled to interest on that sum. (*c*) However, if the original contract be void, as if it be a parol agreement for the sale of lands, the purchaser, as it seems, can only recover his deposit in an action for money had and received, and will not be allowed interest. (*d*) In order to recover interest, it is necessary to declare on the special contract, or to add a specific count for interest, since interest cannot be recovered under a count for money had and received. (*e*) Nor can the expenses of investigating the title be recovered under a count for money paid, but the plaintiff must declare specially. (*f*) A purchaser is not entitled to recover a compensation for the fancied goodness of his bargain, where the vendor is, without fraud, incapable of making a title. (*g*)

The plaintiff will be compelled to give the defendant a particular of every matter of fact, which he intends to rely upon at the trial, as having been a cause of his not being able to complete the purchase, but he is not bound to state in his particular, any objections in point of law, arising upon the abstract (*h*), but if a particular has not been given, the plaintiff will be at liberty to prove any ground for rescinding the contract. (*i*)

A payment of the deposit to the agent of the vendor is in law

(*a*) Maberley v. Robins, 5 Taunt. 625. Elliott v. Edwards, 3 Bos. and Pul. 181. Sugd. V. and P. 219, 6th edit. But see Alpass v. Watkins, 8 T. R. 516. Romilly v. James, 1 Marsh. 600, 2 Phill. Evid. 101, 6th edit. See also R. v. Inhab. of Toddington, 1 B. and A. 560.

(*b*) Richards v. Barton, 1 Esp. N. P. C. 268. Turner v. Beaurain, MS. Sugd. V. and P. 214 Farquhar v. Farley, 7 Taunt. 592; but see Wild v. Forte, 4 Taunt. 341. Sugd. Vend. and Purch. 488, 6th edit.

(*c*) Sugd. Vend. and Purch. 488, 6th edit.

(*d*) Walker v. Constable, 1 Bos. and Pul. 306. Sugd. Vend. and Purch. 214, 6th edit.

(*e*) Walker v. Constable, *ubi sup.* Tappenden v. Randall, 2 Bos. and Pul. 472. Marshall v. Poole, 13 East, 100. And see Slack v. Lowell, 3 Taunt. 157.

(*f*) Camfield v. Gilbert, 4 Esp. N. P. C. 221.

(*g*) Bratt v. Ellis, MS. Sugd. V. and P. 213, 6th edit. Flureau v. Thornhill, 2 Wm. Bl. 1078.

(*h*) Collett v. Thompson, 3 Bos. and Pul. 246.

(*i*) Squire v. Tod, 1 Campb. N. P. C. 293.

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a payment to the principal; and in an action against the latter for the recovery of the money, it is immaterial, whether it has actually been paid over to him or not. (*a*) If the deposit has been paid to the auctioneer, who has not paid it over to his principal, if a good title cannot be made out, an action to recover the deposit may be maintained against the auctioneer (*b*); but it seems that interest on the deposit cannot be recovered against him unless under particular circumstances, and at all events, not before a demand for the repayment of the deposit has been made upon him. (*c*) But where an auctioneer does not disclose the name of his principal, an action will lie against him for *damages* on breach of contract. (*d*) Where the purchaser recovers the deposit only from the auctioneer, he may, in an action against the vendor, recover interest on it, and the expenses of investigating the title under a special declaration. (*e*)

(*a*) Duke of Norfolk v. Worthy, 1 Campb. N. P. C. 337.

(*b*) Burrough v. Skinner, 5 Burr. 2639, and see Edwards v. Hodding, 5 Taunt. 815. 1 Marsh. 377, S. C.

(*c*) Lee v. Munn, 1 B. Moore, 481. 8 Taunt. 45. Holt's N. P. C. 569. S. C. Sugd. V. and P. 487, 6th edit. Farquhar v. Farley, 7 Taunt. 594.

(*d*) Hanson v. Roberdeau, Peake's N. P. C. 120. See Simon v. Motivos, 3 Burr. 1921. Owen v. Gooch, 2 Esp. N. P. C. 567.

(*e*) Farquhar v. Farley, 7 Taunt. 592.

Assumpsit for Use and Occupation.

It was formerly held that an action of assumpsit could not be maintained for rent arrear either before or after the determination of the term, it being a real contract, and debt, or a distress, being considered the proper remedy. (*a*) But on an express promise to pay a sum of money in consideration of the occupation of the premises an action of assumpsit lay at common law. (*b*)

At length by statute 11 Geo. 2, c. 19, s. 14, it was enacted, that it shall and may be lawful to and for the landlord or landlords, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements, or hereditaments, held or occupied by the defendant or defendants, in an action on the case for the use or occupation of what was so held or enjoyed; and if in evidence on the trial of such action, any parol demise, or any agreement, (not being by deed) whereon a certain rent was reserved, shall appear, the plaintiff in such action, shall not, therefore, be nonsuited, but may make use thereof as an evidence of the quantum of the damages (*c*) to be recovered.

In this action, the landlord who has rent owing to him recovers not the rent, but an equivalent for the rent for the premises which have been held and enjoyed under the demise. The statute meant to provide an easy remedy in the simple case of actual occupation, leaving other more complicated cases to their ordinary remedy. (*d*)

Plaintiff's title.

It is not necessary that the plaintiff should have the legal estate in order to enable him to recover for use and occupation (*e*), since the defendant will not be allowed to controvert the title of him, by whose permission he occupied the premises. (*f*) But unless the defendant came in under the plaintiff, or has recognised his title, the latter can only recover rent from the time of

(*a*) Brett v. Read, Sir W. Jones, 329, Cro. Car. 343, S. C. 1 Rol. Ab. 7. l. 23.

(*b*) Johnson v. May, 3 Lev. 150. Acton v. Symonds, Sir W. Jones, 364. Naish v. Tatlock, 2 H. Bl. 323.

(*c*) See Tomlinson v. Day, 2 Brod. and Bing. 680.

(*d*) Per Eyre, C. J. Naish v. Tatlock, 2 H. Bl. 323.

(*e*) Hull v. Vaughan, 6 Price, 157.

(*f*) Cooke v. Loxley, 5 T. R. 4, and see post.

the legal estate being vested in him, although he may have had the equitable estate long before. (*a*) The grantee of the reversion may maintain an action for use and occupation, unless before notice of the plaintiff's title, the rent has been paid to the grantor (*b*); and where the reversion was granted to trustees in trust for A., and the tenant had notice of A.'s title, but not of the legal title of the trustees; it was held that the latter might recover, in assumpsit for use and occupation, the rent accruing after such notice, although the tenant had paid such rent to the original landlord. (*c*) Plaintiff's title.

Where two tenants in common join in a lease, reserving an entire rent, they may join in an action for use and occupation to recover the same (*d*), and where premises had been demised by two tenants in common, and the rent for a time paid to the agent of both, but afterwards the tenant had notice to pay a moiety of the rent to each of the two, and the rent was so paid accordingly, and separate receipts given; it was held that it was a question of fact for the jury to say, whether it was the intention of the parties to enter into a new contract of demise with a separate reservation of rent to each. (*e*)

Where several persons rented premises to be used as a Jewish synagogue, the seats of which were let out by a person appointed annually, who received the rents, and applied them partly in the payment of the rent for the premises, and partly for general purposes connected with the Jewish religion; it was held that the action for the rent due from the occupier of a seat was rightly brought in the names of the lessees. (*f*)

The defendant who has obtained possession, or holds under the plaintiff, will not be permitted to impeach his title, or to give any matter in evidence which would be sufficient to support a plea of *nil habuit in tenementis*. (*g*) Thus, in an action for use and occupation by an incumbent against a tenant of the glebe lands, who had paid rent, it was held that the defendant could not give evidence of a simoniacal presentation of the plaintiff in

(*a*) Cobb v. Carpenter, 2 Campb. N. P. C. 13, n.
(*b*) Birch v. Wright, 1 T. R. 378, Watts v. Ognell, Cro. Jac. 392.
(*c*) Lumley v. Hodgson, 16 East, 99.
(*d*) *Per* Abbot, C. J. Powis v. Smith, 5 B. and A. 850.
(*e*) *Ibid.*
(*f*) Israel v. Simmons, 2 Stark. N. P. C. 356.
(*g*) Syllivan v. Stradling, 2 Wils. 215.

Plaintiff's title.

order to avoid his title (*a*); but the defendant may shew that the plaintiff's title has expired (*b*), though where the defendant had come in under the plaintiff, Lord Ellenborough held that it was not competent for him to shew that the plaintiff's title had expired, unless he had, at the time, solemnly renounced the plaintiff's title, and commenced a fresh holding under another person. (*c*) Where A. hired apartments by the year from B.; and B. afterwards let the entire house to C., who sued A. for use and occupation; it was held that A. could not impeach C.'s title. (*d*) A submission to a distress is such an acknowledgment of the landlord's title, as to preclude the tenant from afterwards denying it. (*e*)

A judgment by default in an action for the use and occupation of a house amounts to an admission that the defendant held a house of the plaintiff, who need not shew that it was his house, and it lies upon the defendant to prove that he did not occupy the particular house to which the attention of the jury has been directed. (*f*)

What occupation by the defendant is sufficient.

The action for use and occupation depends either upon actual occupation, or upon an occupation which the defendant might have had, if he had not voluntarily abstained from it. (*g*) It is not therefore necessary that there should have been a personal occupation of the premises by the defendant; thus if A. agree to let lands to B., who permits C. to occupy them, B. may be sued in assumpsit for use and occupation (*h*); and where the plaintiff declared in assumpsit, that in consideration that he would permit the defendant to occupy a house for four weeks, at ten guineas per week, the defendant undertook to pay the said rent, the court of King's Bench held that the plaintiff was entitled to recover, though the defendant never took possession,

(*a*) Cooke v. Loxley, 5 T. R. 4. Brooksby v. Watts, 6 Taunt. 333. Phipps v. Sculthorpe, 1 Barn. and Ald. 50.

(*b*) Holmes v. Pontin, Peake, 99. Morgan v. Ambrose, Peake's Evid. 242. 4 T. R. 682. Doe d. Jackson v. Ramsbottom, 3 M. and S. 516. Gravenor v. Woodhouse, 1 Bingh. 43. Doe d. Prichitt v. Mitchell, 1 B. and B. 11.

(*c*) Balls v. Westwood, 2 Camp. N. P. C. 11. See Neave v. Moss, 1 Bing. 360.

(*d*) Rennie v. Robinson, 1 Bing. 147.

(*e*) Panton v. Jones, 3 Campb. N. P. C. 372.

(*f*) Davis v. Holdship, 1 Chitty's Rep. 644, n.

(*g*) Per Gibbs, C. J. Whitehead v. Clifford, 5 Taunt. 519, as to the commencement of the occupation, see De Medina v. Polson, Holt's N. P. C. 47.

(*h*) Bull v. Sibbs, 8 T. R. 327.

Defendant's occupation.

and that the letting and hiring was evidence of a promise, sufficient to enable the party to bring assumpsit. (*a*) So the tenant is answerable in this action during the continuance of the tenancy, although he has quitted possession in pursuance of a parol licence from his landlord (*b*), and although on his quitting possession the landlord put up a bill in the window for the purpose of having the premises let (*c*); unless the landlord has accepted another person as tenant, which operates as a surrender of the first tenant's term (*d*), or unless the landlord has himself determined the occupation, as by accepting the key of the house. (*e*)

So it was held, that assumpsit for use and occupation lay against a lessee upon his agreement to pay rent during the tenancy, notwithstanding his bankruptcy, and the occupation of his assignees during part of the time for which the rent accrued (*f*); but where the tenant becomes bankrupt in the middle of a year, and the assignees enter and occupy the premises for the remainder of the year, assumpsit for use and occupation cannot be maintained against them, for the bankrupt's occupation as well as their own, without proving that the bankrupt's occupation was at their request. (*g*)

And in the same manner a husband is not liable for the occupation of a house by his wife *dum sola*. (*h*)

Although the premises are burnt down and remain unoccupied by the tenant, yet the tenancy still subsists and the tenant is liable in use and occupation for the rent accruing subsequently to the fire. (*i*)

Where the premises are occupied for an immoral purpose, as for purposes of prostitution, with the plaintiff's knowledge, the contract is *contrà bonos mores*, and no action is maintainable. (*k*)

(*a*) Dingly v. Angove, 2 Smith, 18. Conolly v. Baxter, 2 Stark. N. P. C. 527.

(*b*) Mollett v. Brayne, 2 Campb. N.P. C. 104. Harding v. Crethorn, 1 Esp. N. P. C. 57. Harland v. Bromley, 1 Stark. N. P. C. 455. Ward v. Mason, 9 Price, 291. Matthews v. Sawell, 8 Taunt. 270. Thomson v. Wilson, 2 Stark. N. P. C. 379.

(*c*) Redpath v. Roberts, 3 Esp. N. P. C. 225. Griffiths v. Hodges, 1 Carrington, N. P. C. 420.

(*d*) Thomas v. Cook, 2 Barn. and Ald. 119. Harding v. Crethorn, 1 Esp. N. P. C. 57.

(*e*) Whitehead v. Clifford, 5 Taunt. 518.

(*f*) Boot v. Wilson, 8 East, 311, and see *post*, in "Covenant," and stat. 49, G. 3, c. 121, s. 19.

(*g*) Naish v. Tatlock, 2 H. Bl. 319, but see Gibson v. Courthorpe, 1 Dowl. and Ryl. 205.

(*h*) Richardson v. Hall, 1 Brod. and Bing. 50.

(*i*) Baker v. Holtpzaffell, 4 Taunt. 45.

(*k*) Crisp v. Churchill, cited 1 Bos. & Pul. 340. Girardy v. Richardson, 1 Esp. N. P. C. 13.

Defendant's occupation.

Whether a party who enters upon and occupies premises under a contract for sale, which ultimately goes off, or who enters without any stipulation as to a tenancy, is liable in use and occupation, for the time during which he so occupied, appears to depend upon the particular circumstances of each case, the law raising an implied assumpsit, where it is necessary to do justice between the parties. In an action for the use and occupation of a wharf, it appeared that the plaintiffs had agreed to sell the wharf to the defendant, stating, that the lease had thirteen years to run. The defendant entered into possession, but discovering that the plaintiffs had an interest in the premises for three years only, refused to complete the contract. The defendant's occupation had not been beneficial, but on the contrary he had incurred great expense. Lord Kenyon held, that in order to maintain an action for use and occupation, it must appear, that the occupation had been beneficial, and accordingly nonsuited the plaintiff. (*a*) Where a purchaser took possession of premises under a contract of sale, *having paid the whole of the purchase money*, and on the failure of the vendor to make out a good title, recovered from him the whole of the purchase-money and the expenses of investigating the title, and the vendor sued him for use and occupation for the time during which he had been in possession of the premises, it was held by Mansfield, C. J. that the plaintiff was not entitled to recover, on the ground that during all the defendant's occupation of the premises, the plaintiff had been in the possession of the purchase-money, of which he had made, or might have made, interest; and he accordingly directed a nonsuit, which the court of Common Pleas afterwards confirmed, although the jury found that the value of the premises during the occupation by the defendant exceeded the interest of the purchase money. (*b*) But where the defendant contracted to sell the premises to another, who thereupon sold a part of the property so contracted for, by auction, to the plaintiff, and the plaintiff got possession, and the defendant afterwards refused to perform his contract, which occasioned a suit in equity by the first purchaser against the defendant for a specific performance, pending which, the defendant obtained possession of the premises from the plaintiff on a de-

(*a*) Hearn v. Tomlin, Peake's N. P. C. 192. 6 Price, 169.

(*b*) Kirtland v. Pounsett, 2 Taunt. 145. 6 Price, 169. But the vendee was entitled to recover the interest. See *ante*, p. 402.

mand to be restored to them, as owner, to which the plaintiff consented, under a belief that the defendant had succeeded in the suit in equity, but afterwards that suit was determined in favour of the first purchaser, to whom a conveyance was made by the defendant, it was held by the Court of Exchequer, that the plaintiff, under these circumstances, was entitled to recover against the defendant, in use and occupation, for the time during which the defendant had occupied the premises, though he was himself at that time the legal owner. (*a*) In the following case, however, the circumstances were such that Abbot, C. J. held that no contract could be implied.

Defendant's occupation.

In April, 1817, the plaintiff agreed with the proprietor of a house to purchase the lease, and accordingly paid part of the purchase money, and gave bills for the rest. In the same month Mrs. Musters, the plaintiff's mistress, took possession of the house with his permission, and had resided there ever since. The plaintiff having gone abroad, returned in October, and found Mrs. Musters living in the house with the defendant, to whom she was married about Christmas following. At an interview between the plaintiff and Mrs. Musters, the latter agreed to take up the bills for the remainder of the purchase money, and the plaintiff gave directions that the house should be conveyed to her. Mrs. Musters did not take up the bills, and the defendant had remained in possession of the house since Christmas, 1817. No notice to pay rent to the plaintiff was proved. Abbott, C. J. said, that it did not appear that there was any contract express or implied to pay rent for the house, and under the circumstances it was impossible to say, whether the contract was to pay rent, or to pay for the house. If a communication had been made to the defendant that the plaintiff insisted upon the payment of rent, and he had afterwards remained in the house, it might possibly have been inferred that he intended to pay the rent. As the case stood, however, there was nothing from which any contract could be inferred to pay rent, for a year, month, week, or any other period. (*b*) Where the defendant has been let into possession of premises under an agreement for a lease not operating as a lease, the proper remedy is by an action for use and occupation (*c*), and a distress cannot be maintained. (*d*)

(*a*) Hull v. Vaughan, 6 Price, 157. 5 Barn and Ald. 326. Hamerton v. Stead, 3 B. & C. 482.

(*b*) Keating v. Bulkely, 2 Stark. N. P. C. 419.

(*c*) *Per* Bayley, J. Dunk v. Hunter,

(*d*) *Ibid.*

Defendant's occupation.

Where A., without title, gave possession of a house to B., and C. the owner, brought assumpsit for use and occupation, Lord Hardwicke held the action not maintainable by him; because B. had not received his possession from C., nor in any wise occupied under him. (*a*)

When the occupation is determined.

It has been already stated, that where the landlord accepts another person as tenant, such acceptance operates as a surrender in law of the first tenant's term, who cannot be sued in an action for use and occupation, for rent subsequently accruing (*b*). So if the landlord in the middle of a quarter accepts from the tenant the key of the house demised, under a parol agreement, that upon his giving up possession the rent shall cease, and the tenant quits the premises accordingly; no action for use and occupation lies for the time subsequent to the landlord's acceptance of the key (*c*), but evidence that the keys of the premises were delivered by an agent of the defendant to a servant at the plaintiff's house, and that the plaintiff subsequently declared, that the keys had been lost or mislaid, is not sufficient to prove the occupation determined (*d*).

The occupation may also be determined by the act of the lessor alone, as by eviction. Thus, where premises are let at an entire rent, an eviction from part, if the tenant gives up possession of the residue, is a complete defence in an action for use and occupation (*e*). But if the tenant after eviction continues in possession of the residue, he may, it is said, be liable on a *quantum meruit*. (*f*) Where A. the plaintiff let lands to B., who underlet to C. and others, and A. gave notice to C. and the other undertenants to quit, and C. quitted accordingly, and the lands before occupied by him, remained unoccupied for a year, and were then again let by B.; Lord Ellenborough was of opinion that A. was guilty of an eviction as to the premises occupied by C., and suggested that an eviction might have been pleaded as to the whole demand, and the plaintiff was accordingly nonsuited (*g*).

(*a*) Cited in Richards v. Holditch, Say. 13.

(*b*) Cook v. Thomas, 2 Barn. & Ald. 119. *Ante*, p. 407; and see Hamerton v. Stead, 3 B. & C. 478. Stone v. Whiting, 2 Stark. N. P. C. 235.

(*c*) Whitehead v. Clifford, 5 Taunt, 518.

(*d*) Harland v. Bromley, 1 Stark. 455.

(*e*) Smith v. Raleigh, 3 Campb. N. P. C. 513, see Griffiths v. Hodges, 1 Carrington, N. P. C. 420.

(*f*) Stokes v. Cooper, cited 3 Campb. N. P. C. 514, (note) see Tomlinson v. Day, 2 Brod. & Bing. 681. 5 B. Moore, 565, S. C.

(*g*) Burn v. Phelps, 1 Stark. N. P. C. 94.

Defendant's occupation.

If the landlord treats the tenant as a trespasser, he cannot afterwards charge him in an action for use and occupation. Thus, where he has recovered in ejectment, he may sue for the rent accruing before the day of the demise in the ejectment, but not for rent accruing subsequently to that time (*a*). It has however been ruled by Lord Ellenborough, that the fact of the plaintiff *having brought* an ejectment for the same premises, is no bar to an action for use and occupation, but only matter of special application to the court (*b*).

Where the demise is by deed.

Where the demise is by deed, an action of assumpsit for use and occupation by force of the statute, will not lie. But where the defendant entered upon the premises by virtue of an agreement under seal for a lease, not operating as a lease, Lord Kenyon ruled, that the action was maintainable (*c*).

Declaration.

The form of the declaration in assumpsit for use and occupation is very general. The plaintiff need not state the local situation of the premises (*d*), but if they are described as situate in a wrong parish, it is a fatal variance (*e*); however, where the premises were stated to be situate in the parish of *Lambeth*, and the real name of the parish was *St. Mary Lambeth*, though it was commonly known by the name of *Lambeth*, the court of Common Pleas held the variance to be immaterial (*f*).

The plaintiff must state with correctness by whose permission the defendant occupied. Thus, in an action by the Dean and Chapter of Rochester, where the name of the present Dean was mentioned at the beginning of the declaration, and it was afterwards laid, that the occupation was, "by the permission of the said Dean and Chapter," and it appeared in evidence, that the defendant had only occupied in the time, and by the permission of a former dean, the plaintiff was nonsuited by Lord Ellenborough, and on a motion to set aside the nonsuit, the court of King's Bench being equally divided, the nonsuit stood (*g*). And

(*a*) Birch v. Wright, 1 T. R. 378.

(*b*) Cobb v. Carpenter, 2 Campb. N. P. C. 13, (note).

(*c*) Elliott v. Rogers, 4 Esp. N. P. C. 59.

(*d*) King v. Fraser, 6 East, 348. Egler v. Marsden, 5 Taunt. 25, in Debt. Kirtland v. Pounsett, 1 Taunt. 571.

(*e*) Wilson v. Clark, 1 Esp. N. P. C. 273. Guest v. Caumont, 3 Camp. N. P. C. 235.

(*f*) Kirtland v. Pounsett, 1 Taunt. 570. Goodtitle v. Walter, 4 Taunt. 672.

(*g*) Dean & Chapter of Rochester v. Pierce, 1 Campb. N. P. C. 468.

Declaration.

so where the premises have been held by the sufferance and permission of two persons, one of whom is dead, the plaintiff must not allege that they have been held by *his* sufferance and permission only (*a*).

Plea.

General issue.

The defendant under the general issue may give evidence of facts amounting to an eviction (*b*); and if he is executor, and is sued as assignee of the term, he may give in evidence, that the land is of less value than the rent (*c*).

Statute of limitations.

The statute of limitations is a good defence in an action for use and occupation, against a person who has been tenant from year to year, but who has not within the last six years occupied the premises, paid rent, or done any act from which a tenancy can be inferred, although the tenancy has not been determined by a notice to quit (*d*).

Nil habuit in tenementis.

The defendant will not be allowed to impeach the title of the plaintiff by whose permission he occupied the premises. Therefore a plea of *nil habuit in tenementis* cannot be pleaded even where the declaration does not state the premises to belong to the plaintiff, if it is alleged, that the defendant occupied by the permission of the plaintiff (*e*).

Evidence.

Title of the plaintiff.

The plaintiff must prove that the defendant occupied the premises by his permission. This may be done by the production of the lease or agreement, if there should be one, and by proving it in the usual manner, by calling the attesting witness, or if there be no attesting witness, by giving evidence of the handwriting of the party. If there be no lease or agreement, the fact of the defendant having occupied by the permission of the plaintiff, may be proved by giving in evidence any of those circumstances which are sufficient to constitute a good title to sue in this species of action (*f*), as that the defendant has paid rent to the plaintiff, or has submitted to a distress by him.

Defendant's occupation.

It is *primâ facie* sufficient for the plaintiff to shew an occu-

(*a*) Israel v. Simmons, 2 Stark. N. P. C. 356, and see Jell v. Douglas, 4 Barn. & Ald. 374.

(*b*) Burn v. Phelps, 1 Stark. N. P. C. 94.

(*c*) Remnant v. Bremridge, 2 B. Moore, 94, 8 Taunt. 191, S. C. 1 Saund. 1 a. (n.) (5th edit.)

(*d*) Leigh v. Thornton, 1 Barn. & Ald. 625.

(*e*) Richards v. Holditch, cited in Lewis v. Walis, Say. 13. 1 Wils. 314, S. C.

(*f*) See *ante*, p. 405.

pation of the premises by the defendant, and the continuance of the tenancy will be presumed until the contrary appear (*a*). The mode in which the occupation may be determined has been already stated (*b*). In an action for use and occupation, charging the defendant, who was administrator of the original lessee, as assignee, for rent due after the testator's death, it was held, that although the defendant had taken possession, yet having proved that the premises had been productive of no profit to him, and that eight months after the death of the intestate, he had offered to surrender them to the plaintiff, such proof constituted a good defence to the action (*c*). Evidence.

If the local situation of the premises has been described, the proof must correspond with that description (*d*). Situation of premises.

The statute 11 Geo. 2, c. 19, s. 14, enacts, that where any agreement (not being by deed) whereon a certain rent was reserved shall appear, the plaintiff shall not be nonsuited, but may make use thereof as an evidence of the quantum of the damages to be recovered. But where A. took a farm under an agreement, which he never signed, and the material terms of which his lessor failed to fulfil, it was held that the jury might ascertain the value of the land without regarding the amount of rent reserved by the agreement (*e*). Damages.

If it appears that the defendant held under a written agreement, which for want of a stamp cannot be received in evidence, the plaintiff will not be allowed to go into general evidence: for the agreement is the best evidence of the nature of the occupation (*f*), but where parol evidence is offered to prove a tenancy, it is not a valid objection that there is some written agreement relative to the holding, unless it should appear that the agreement was between the parties as landlord and tenant, and that it continued in force to the very time to which the parol evidence applies (*g*).

(*a*) Harland v. Bromley, 1 Stark. N. P. C. 455. Ward v. Mason, 9 Price, 291. As to evidence of tenancy see Townsend v. Davis, Forrest, 120.

(*b*) *Ante*, p. 410.

(*c*) Remnant v. Bremridge, 2 B. Moore, 94. 8 Taunt. 191, S. C.

(*d*) See *ante*, p. 411.

(*e*) Tomlinson v. Day, 2 Brod. & Bing. 680. 5 B. Moore, 558, S. C. and see Dunk v. Hunter, 5 Barn. & Ald. 326.

(*f*) Brewer v. Palmer, 3 Esp. N. P. C. 213. Ramsbottom v. Mortley, 2 M & S. 445. 1 Phill. Evid. 486. (6th edit.)

(*g*) Doe d. Wood v. Morris, 12 East, 237, 2 Phill. Evid. 104. (6th edit.)

Covenant.

Construction of covenants in general.

A COVENANT is to be expounded with a regard to its context, and such exposition must be upon the whole instrument *ex antecedentibus et consequentibus*, and according to the reasonable sense and construction of the words (*a*). The words of a covenant must be taken most strongly against the covenantor (*b*), a mode of interpretation which must be qualified by a due regard to the intention of the parties, as collected from the whole context of the instrument (*c*). It is immaterial in what part of a deed any particular covenant is inserted, for in construing it, the whole deed must be taken into consideration, in order to discover the meaning of the parties (*d*). In the construction of a covenant the acts of the parties, or their interpretation of the instrument, are not to be considered. In one case indeed, where it was doubted, whether a covenant for renewal extended to a perpetual renewal, and the parties had renewed four times successively, the court of King's Bench held that the legal effect was a perpetual renewal, on the ground that the parties themselves had by their own acts put a construction on the covenant, and that the court could not say the contrary (*e*). But this case has been frequently disapproved of, and a different rule is now established (*f*).

Express or implied.

The word "demise" or "grant" in a lease for years, contains an implied covenant for quiet enjoyment during the term (*g*). Whether the words *yielding and paying* in a lease, constitute

(*a*) *Per* Ld. Ellenborough, C. J. Iggulden v. May, 7 East, 241. Trenchard v. Hoskins, Winch, 93. Barton v. Fitzgerald, 15 East, 541. Nind v. Marshall, 1 Brod. & Bing. 326.

(*b*) *Per* Mansfield, C. J. Flint v. Brandon, 1 Bos. & Pul. N. R. 78. Shep. Touch. 166.

(*c*) *Per* Ld. Eldon, C. J. Browning v. Wright, 2 Bos. and Pul. 22.

(*d*) *Per* Buller, J. Duke of Northumberland v. Ward Errington, 5 T. R. 526. Kingston v. Preston, cited in Jones v. Barkley, Dougl. 684. 1 Saund. 60, a, (notes).

(*e*) Cooke v. Booth, Cowp. 819.

(*f*) Baynham v. Guy's Hospital, 3 Ves. 498. Eaton v. Lyon, 3 Ves. 694. Moore v. Foley, 6 Ves. 238, Iggulden v. May, 9 Ves. 333. 2 Bos. and Pul. N. R. 482, S. C. Clifton v. Walmsley, 5 T. R. 566. 1 Phill. Evid. 528. (6th edit.)

(*g*) Nokes's case, 4 Rep. 80, b. Com. Dig. Cov. (A. 4). Shep. Touch. 160. See *ante*, p. 259; and Hob. 4, as to the warranty arising on the word *dedi*.

an express or implied covenant, for the payment of the rent, appears not to be settled (*a*).

Construction of covenants for title.

In the construction of covenants for title, a question frequently arises on the effect of restrictive words, as affecting other words in the same covenant, or in other covenants. The cases on this subject, which are very numerous, will be considered under the following heads. 1. Where general words are restrained by subsequent qualified words in the same covenant. 2. Where general words are *not* so restrained. 3. Where a general covenant is restrained by qualified words in another covenant. 4. Where a general covenant is *not* restrained by qualified words in another covenant.

Effect of restrictive words.

In the early case of Broughton v. Conway, 7 Eliz. (*b*), where the defendant covenanted "that he had not made any former grant, &c. whereby that grant might be in any manner impaired, &c., *but that* the assignee, &c. might quietly enjoy without impediment by him or by any other person," it was held, that the words, "but that," depended on the precedent matter, and were no new matter or sentence, so that the covenantor was held to have covenanted only against his own acts. Again, in the case of Peles v. Jervies, 40 Eliz. (*c*), where tenant *pur autre vie* leased for twenty-one years, and covenanted that *he* had not done any act, *but that* the lessee should or might enjoy it during the years, it was held, that "but," referred the words subsequent to the words precedent. So where Lord Rich covenanted, that certain lands were of the value of 1,000*l.* and so should continue *notwithstanding* any act done, or to be done by him, it was adjudged, that the covenant was not broken, unless some act done by him were the cause of the breach. (*d*)

1. Where general words are restrained by qualified words in the same covenant.

Where there was a covenant for quiet enjoyment during a term, without the lawful let, &c. of J. M. his executors, &c., or any

(*a*) That the words make an express covenant, see Helier v. Casbard, 1 Sid. 266, *nota*. Newton v. Osborn, Sty. 387. Porter v. Swetnam, Sty. 406, 431, and see 1 Rol. Ab. 519, l. 26. That the words make only an implied covenant, see 1 Sid. 447, *nota*. Com. Dig. covenant. (A. 4.) 1 Saund. 241, b, (note) 5th edit. Harper v. Burgh, 2 Lev. 206. Procter v. Johnson, 2 Brownl. 212. Webb v. Russel, 3 T. R. 402. See also Dyer, 57, a. 6 Vin. Ab. 379. Wadham v. Marlowe, 1 H. Bl. 438.

(*b*) Dyer, 240, a. Moor, 58, S. C. and see Sugd. Vend. and Purch. 557, 6th edit. Nind v. Marshall, 1 Brod. and Bing. 340.

(*c*) Dyer, 240, a. margin.

(*d*) Rich v. Rich, 17 Eliz. Cro. Eliz. 43.

Construction of covenants for title.

of them, or any other person or persons whomsoever, having, or lawfully claiming, any estate, &c., in the premises; *and that* free and clear, and freely and clearly discharged, or otherwise by the said J. M. his heirs, &c., defended, &c., from all former gifts made or suffered by J. M., or by their, or either of their acts, &c.; and this covenant was preceded by a covenant, that the lease was a good lease *notwithstanding any act of J. M.*, and followed by a covenant for further assurance by J. M. his executors, &c., and all persons whomsoever claiming, during the residue of the term, any estate in the premises *under him or them;* it was held, (Park, J. *dissentiente*), that the covenant for quiet enjoyment extended only against the acts of the covenantor, and those claiming under him, and not against the acts of all the world. Richardson, J. and Burrough, J. considered the qualifying words as part of the covenant for quiet enjoyment. (*a*)

2. Where general words are not restrained by qualified words in the same covenant.

The plaintiff declared in covenant, that the defendant bargained and sold to him certain lands, which he had purchased of Woolaston, &c., and covenanted, that he was seised of a good estate in fee *according to the indenture made to him by Woolaston, &c.* Breach, that he was not seised of a good estate in fee. The defendant pleaded, that he was seised of as good an estate as Woolaston, &c. conveyed to him; to this the plaintiff demurred, and judgment was given for him, because the covenant was absolute, that the defendant was seised of a good estate in fee, and the reference to the conveyance by Woolaston, &c., only served to denote the *limitation* and *quantity* of estate, not the defeasibility or indefeasibility. (*b*)

3. Where a general covenant is restrained by qualified words in another covenant.

Where a man *demised and granted* a house for a term of years, and covenanted, that the lessee should enjoy the same during the term, *without eviction by the lessor, or any claiming under him,* the court held, that the latter special covenant qualified the generality of the covenant in law, raised by implication from the words *demised* and *granted.* (*c*) According to Croke's

(*a*) Nind v. Marshall, 59 Geo. 3. 1 Brod. and Bing. 319. The case of Browning v. Wright, 2 Bos. and Pul. 13, *post*, might, perhaps, be classed under this head. See also Horsfall v. Testar, 1 B. Moore, 89.

(*b*) Cooke v. Founds, 13 Car. 2. 1 Lev. 40; and see Noble v. King, 1 H. Bl. 34.

(*c*) Nokes's case, 41 Eliz. 4 Rep. 80, b. Cro. Eliz. 674, S. C. Merrill v. Frame, 4 Taunt. 329.

report of this case, Popham, C. J. alone inclined to this opinion, the rest of the court not delivering any opinion upon the question, and judgment was given for the defendant upon another point, whereupon the plaintiff was permitted to discontinue. The law, however, as laid down by Sir Edward Coke, has been since frequently recognised. (*a*) It appears, that two cases (*b*) were cited to shew, that an express warranty does not destroy a warranty in law (*c*); and, that therefore, a covenant in fact could not restrain an implied covenant; but it should be observed, that in the cases cited, the warranty in law, and the express warranty, were *both general.* (*d*)

Construction of covenants for title.

Where a feoffment contained the following covenants: 1, that notwithstanding any act by the feoffor done to the contrary, he was seised in fee simple, or in fee tail, without any condition or limitation to determine it: and 2, that he had good power and rightful authority to sell: and 3, that the lands were clear of all incumbrances made by him, his father, or grandfather: and 4, that the feoffee should enjoy against all persons claiming under him, his father, or grandfather; and a breach was assigned, that the feoffor had not good power to sell; and the defendant pleaded, that notwithstanding any act done by him, the feoffor had good power to sell, upon which the plaintiff demurred, it was admitted, that these were all distinct covenants, and North, C. J. held, that the covenant in question was absolute; but all the other justices were of opinion, that these covenants were synonymous, and of the same nature; and that the covenant upon which the action was brought, was therefore qualified. (*e*) Here, notwithstanding the covenants were held to be all separate, the majority of the court thought the covenant in question qualified; because it was of the *same nature* as the others. (*f*) This case nearly resembles the following case of Browning v. Wright. In both, the general covenant, which was held to be qualified, was the covenant for good power to convey,

(*a*) By Hale, C. J. in Deering v. Farrington, 1 Mod. 113, by Vaughan, C. J. in Hayes v. Bickerstaff, Vaughan, 126, and by Buller, J. in Browning v. Wright, 2 Bos. and Pul. 26.

(*b*) Fitz. Ab. Voucher, 289. Counterplea de Gar. 7.

(*c*) Co. Litt. 384, a. *Ante*, p. 260.

(*d*) 4 Rep. 81, a.

(*e*) Nervin v. Munns, 33 Car. 2. 3 Lev. 46.

(*f*) But see Norman v. Foster, 1 Mod. 101, and Howell v. Richards, 11 East, 642; and *post*, where a distinction is taken between the covenants for title and the covenant for quiet enjoyment.

Construction of covenants for title.

and in both, the covenants, for seisin in fee and quiet enjoyment, were special.

A. after granting certain premises to B. in fee, and warranting the same against himself and his heirs, covenanted, that notwithstanding any act by him done to the contrary, he was seised of the premises in fee, and that he had full power, &c. to convey the same in manner aforesaid; and he did further covenant for himself, &c. to make a cart-way, and that B. should quietly enjoy without interruption from himself, or any person claiming under him; and lastly, that he, his heirs, &c. and all persons claiming, &c. under him, should make further assurance. It was held, that the intervening words, " full power, &c. to convey," were either part of the preceding special covenant; or if not, that they were qualified by the other special covenants. (*a*)

In the opinion of Lord Alvanley, C. J. the case was rightly decided upon the first ground. The defendant, he observes, having covenanted " for and notwithstanding any thing by him done to the contrary," he was seised in fee, *and that* he had good right to convey, the latter part of the covenant, coupled as it was with the former part, by the words " and that," must necessarily be overridden by the introductory words, " for and notwithstanding any thing by him done to the contrary." (*b*)

4. Where a general covenant is not restrained by qualified words in another covenant.

There being two jointenants for years of a mill, one of them granted all his estate, and died; the other reciting the lease and death of his companion, and that he had all by survivorship, granted the said mill to the plaintiff, and all his estate therein, and covenanted that the defendant should quietly enjoy it, *without any act by him, &c.*; and he bound himself in a bond, on which the action was brought, to the performance of all the grants, articles, and agreements, contained in the indentures. The breach assigned was, that the other jointenant had granted his moiety, so that the plaintiff could not enjoy the whole mill. On demurrer to the plea, judgment was given for the plaintiff, upon which error was brought, and the court of King's Bench held the breach to be well assigned, because the defendant reciting, that he had the whole estate, and granting *the said mill*, it must be understood to be the entire mill, which was the grant

(*a*) Browning v. Wright, 40 Geo. 3, 2 Bos. and Pul. 13. See also Foord v. Wilson, 8 Taunt. 543.

(*b*) Hesse v. Stevenson, 3 Bos. and Pul. 574.

Construction of covenants for title.

and agreement to which the obligation refers, *and the last clause cannot qualify it.* (*a*) The principle upon which this case was decided, is said by Lord Eldon (*b*), to have been the intention of the parties. The grantor, he observes, having stated in the recital (*c*), that he was interested in the whole of the premises, when, in fact, he was interested in a moiety only, the court would not permit him to contend, that a covenant for quiet enjoyment, "notwithstanding any act done by him," was satisfied by a compliance with the mere words of that covenant, in a case where the grantee had suffered eviction, not in consequence of any act done by the grantor, but in consequence of the badness of his title. It has been observed, that the ground of the decision in this case appears to be, that the word *grant* in the assignment, amounted to a warranty of the title, and was not qualified by the ensuing particular covenant, because the grant was of the whole estate, as appeared from the recital, and was defective from the first, as to a moiety, and the condition of the bond was to perform all *grants*, &c. (*d*)

A. covenanted that he was seised of a manor, &c., of a lawful estate in fee, notwithstanding any act done *by him* or any of his ancestors, *and that* no reversion or remainder was in the king or any other; *and that* the said manor was then of the annual value of, &c.; *and that* the plaintiff and his heirs, should enjoy it according to the limitations, discharged and saved harmless from all incumbrances made by him or any of his ancestors. The question was, whether the covenant for the value depended upon the first part of the covenant, *that notwithstanding, &c.* or was an absolute and distinct covenant, and the court resolved, that it was so, and had no dependance upon the qualified covenant. (*e*) The general covenant for the value of the estate, was not of the same import and effect, or directed to the same object as the covenant for seisin in fee; and there was no ground, therefore, for supposing, that the covenantor meant the generality of the former covenant, to be qualified by a reference to the latter. (*f*)

(*a*) Proctor v. Johnson, 6 Jac. 1. Cro. Jac. 233. 2 Brownl. 212. Yelv. 175, S. C.

(*b*) Browning v. Wright, 2 Bos. and Pul. 25.

(*c*) And see as to the effect of the recital, Barton v. Fitzgerald, 15 East, 541.

(*d*) Sugd. Vend. and Purch. 555, 6th edit.

(*e*) Crayford v. Crayford, 2 Car. 1. Cro. Car. 106.

(*f*) See Sugd. Vend. and Purch. 562, 6th edit.

Construction of covenants for title.

In the case of Trenchard v. Hoskins, 21 Jac. 1 (*a*), the plaintiff brought an action of covenant against P. H., and declared upon an indenture made between J. H. father of the defendant, and the defendant of the one part, and the plaintiff of the other part, by which the former bargained and sold certain lands to the plaintiff, and the indenture recited, that Hen. 8, being seised of the lands, granted them by letters patent, and deduced the title to J. H. by descent, and J. H. being so seised, he and P. H. conveyed to the plaintiff, and covenanted, that they the said P. H. and J. H. according to the true meaning of the said indenture, were seised of a good estate in fee simple, and that the said J. and P. or one of them, had good authority to sell *that* according to the true intent of the said indenture; and, that there was no reversion or remainder in the king, by any act or acts, thing or things, done by him or them. The breach assigned was, that neither J. nor P. had a lawful power to sell. The defendant pleaded, that J. had a good power to sell, according to the intent of the said indenture, notwithstanding any act or acts made by him, or his father, or by any claiming under them; to which plea there was a demurrer. Jones, J. held the plea to be good, on the ground, that the whole sentence *was but one covenant;* and Hobart, C. J. was of opinion, that the covenant in question was qualified and dependent; but Hutton and Winch, justices, held, that these were three several covenants, and that the plaintiff was entitled to recover. A writ of error appears to have been afterwards brought. (*b*) Lord Eldon, observing upon this case, says (*c*), " the only ground upon which I can suppose that court to have proceeded, which decided, that the words were not connected with the first covenant, is this, that they considered it to have been the intention of the parties, that the vendor should enter into an absolute covenant for his seisin in fee in all cases but one, viz. that he should not be liable, on the objection of a reversion resting in the crown, unless that reversion appeared to have been vested in the crown by his own act."

Where the defendant covenanted, that he was seised in fee of certain lands, of a lawful estate in fee, *notwithstanding any act done by him, &c., and that* the said lands were of the annual

(*a*) Winch, 91. 1 Sid. 328.

(*b*) See Gainsford v. Gifford, 1 Sid. 328. Browning v. Wright, 2 Bos. and Pul. 19. 2 Rol. Ab. 250, l. 1.

(*c*) Browning v. Wright, 2 Bos. and Pul. 25.

value, &c., the court resolved, that the words, "notwithstanding any act, &c." did not refer to the second covenant as to the value, &c. (*a*)

Construction of covenants for title.

Where on an assignment of a leasehold estate, the defendant covenanted that the indenture of lease was good, sure, and indefeasible, and so should stand and remain to the plaintiff during the residue of the term, *and that* the plaintiff, his executors, &c. should quietly and peaceably have, hold, and enjoy, the said messuage, &c. during, &c. without any let, denial, interruption, or disturbance of the defendant, or his executors or assigns, and acquitted, or otherwise saved harmless, from all incumbrances had, &c. by the defendant, (the rent and covenants upon the original lease only excepted); the question was, whether the generality of the covenant that the lease was indefeasible, was qualified by the special terms of the covenant for quiet enjoyment. For the plaintiff it was argued in favour of the generality of the first covenant, that if a restrictive clause be in the first or last part of a sentence, or at the beginning of the first, or at the end of the last sentence, which in good sense may be applied to one and the other, there it shall extend to both sentences; but, that otherwise it is if such sentence be placed *in the middle* of one or two sentences. The court assented to this rule of construction, and judgment was given for the plaintiff. (*b*) According to Lord Eldon, it appeared from the nature of the assurance in this case to be the intent of the parties, that the words in the last covenant should not attach upon the first. (*c*)

In Norman v. Foster (*d*), Hale, C. J. said, if I covenant, that I have a lawful right to grant, and that you shall enjoy, notwithstanding any claiming under me, these are two several covenants, and the first is general and not qualified by the second; and so said Wild; and, that one covenant went to the *title*, and the other to the *possession*.

The defendant having assigned certain shares in a patent right, covenanted, that he had good right, full power, and lawful

(*a*) Hughes v. Bennet, 13 Car. 1. Cro. Car. 495. Sir W. Jones, 403, S. C. See Crayford v. Crayford, *ante*, p. 419. Sugd. Vend. and Purch. 562, 6th edit.

(*b*) Gainsford v. Griffith, 19 Car. 2, 1 Saund. 58. 1 Sid. 328, S. C. The rule laid down in this case as to construction of covenants, is now exploded. See Mr. Serj. Williams's note to the case, and Nind. v. Marshall, 1 Brod. & Bing. 331.

(*c*) Browning v. Wright, 2 Bos. and Pul. 25.

(*d*) 1 Mod. 101.

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authority, to assign and convey the said shares; *and that* he had not by any means directly or indirectly forfeited any right or authority he ever had, or might have had over the same. The court of Common Pleas held, that the generality of the former covenant was not restrained by the latter. (*a*) It may be observed, that this construction seems to render the qualified words inoperative.

The vendors of an estate covenanted, *that for and notwithstanding any act, &c. by them, or any or either of them done to the contrary,* they were seised of the lands in fee; *and also,* that they, or some, or one of them, *for and notwithstanding any such matter or thing as aforesaid,* had good right and full power to grant, &c.; *and likewise,* that the vendee should peaceably and quietly enter, hold, and enjoy the premises granted, *without the lawful let or disturbance of the releasors or their heirs or assigns, or for or by any other person or persons whatsoever,* and that the vendee should be kept harmless and indemnified by the vendors and their heirs, against all other titles, charges, &c., save and except the chief rent issuing and payable out of the premises to the lord of the fee. It was held, that the generality of the covenant for quiet enjoyment was not restrained by the qualified covenants for good title, and right to convey. (*b*) In this case, Lord Ellenborough draws a distinction between the covenants *for title* and *right to convey,* which are generally of the same import and effect, and directed to the same object, and the covenant *for quiet enjoyment* (*c*), which is of a materially different import, and directed to a different object. In Browning v. Wright (*d*), the covenant held to be restrained was one for *good right to convey;* and, therefore, according to Lord Ellenborough, of the same nature as the covenant for title, which was a qualified one. In Nervin v. Munns (*e*), it may be observed, that the majority of the court were of opinion, that the covenant for quiet enjoyment was of the same nature as the covenants for title and power to sell.

The assignor, in a deed of assignment of a lease, after reciting the original lease granted to another for the term of ten years, and that by mesne assignments, such lease had vested in

(*a*) Hesse v. Stephenson, 44 Geo. 3, 3 Bos. and Pul. 565.

(*b*) Howell v. Richards, 50 Geo. 3, 11 East, 633.

(*c*) See also Norman v. Foster, 1 Mod. 101. *Ante,* p. 421.

(*d*) *Ante,* p. 418.

(*e*) *Ante,* p. 417.

the assignor; and also, that the plaintiff had contracted for the absolute purchase of the premises, bargained, sold, assigned, transferred, and set over the same, to the plaintiff for and during all the rest, &c., of the said term of ten years, in as ample a manner as the assignor might have held the same, subject to the payment of rents and performance of covenants, and then covenanted: 1. That the defendant had not done, &c., any act, &c., whereby the said premises might or could be charged, &c., save and except an under-lease for three years. 2. *And also,* that the said in part recited indenture of lease, was a good and subsisting lease, valid in law, of and for the said premises thereby assigned, and not forfeited, surrendered, or otherwise determined or become void or voidable. 3. And further, that it should be lawful for the plaintiff, &c., during the said term, peaceably and quietly to enter into the said premises assigned, &c., and take the rents, &c., without any lawful let, &c. of the said defendant, his executors, &c., or any other person lawfully claiming, or to claim, the same premises by, from, under, or in trust for him, them, or any of them. 4. That defendant would at all times, during the residue of the term, make further assurance of the premises for all the remainder of the said term, according to the true intent and meaning of those presents. It was held, that the second covenant was not qualified by the preceding or subsequent covenants, Lord Ellenborough remarking, that by holding the second covenant to be absolute, the others were not rendered inoperative. (*a*) This case, it has been observed (*b*), depended upon very particular circumstances, independently of which, it should seem, that the covenant upon which the purchaser recovered, would have been restrained by the other covenants.

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The general principle to be gathered from the foregoing cases is, that a covenant shall be construed to be general or qualified according to the intent of the parties, to be collected from the whole of the deed, or as Lord Alvanley has expressed it, "that however general the words of a covenant may be, yet, if from other covenants in the same deed, it is plainly and irresistibly to be inferred, that the party could not have intended to use the

(*a*) Barton v. Fitzgerald, 52 Geo. 3, 15 East, 530.

(*b*) Sugd. Vend. and Purch. 560, 6th edit.

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words in the general sense, which they import, the court will limit the operation of the general words." (*a*) In addition to this general principle, there are certain subsidiary rules of construction laid down, by which the intent of the parties in each particular case may be ascertained. Thus, if by holding a particular covenant to be general, the covenantor would be deprived of the benefit of the special restrictions in other covenants, such a construction would appear to be against the intent of the parties. "It would be of little service," says Lord Eldon (*b*), "to insist, that the warranty and the covenants for quiet enjoyment, and further assurance, were specially confined to himself and his heirs, if the grantee were at liberty to say, I cannot sue you on these covenants, but I have a cause of action arising upon a general covenant, which supersedes them all." Another rule is laid down by Lord Ellenborough (*c*), that where covenants are of the same import and effect, and directed to one and the same object, the qualified language of the one may be considered as virtually transferred to, and included in the other. So the intent of the parties may be gathered from the nature of the property, whether it be leasehold or freehold, as in the one case more extensive covenants may be required than in the other. (*d*)

Covenant for quiet enjoyment.

In the construction of the general covenant for quiet enjoyment, it has been held, that it does not extend to the tortious disturbance of a stranger. (*e*) In cases, however, where the covenant is expressly against interruption, ***whether it be lawful or tortious*** (*f*), or against the acts of a particular person, it is immaterial whether the disturbance be rightful or not. (*g*) Where a man covenants to indemnify against all persons, this is but a covenant to indemnify against lawful title; and the reason is,

(*a*) Hesse v. Stevenson, 3 Bos. and Pul. 574.

(*b*) Browning v. Wright, 2 Bos. and Pul. 24; and see Nind v. Marshall, 1 Brod. and Bing. 328, 333. Nokes's case, 4 Rep. 81, a.

(*c*) Howell v. Richards, 11 East, 642. See Sugd. Vend. and Purch. 562, 6th edit.

(*d*) Browning v. Wright, 2 Bos. and Pul. 25. See 1 Bligh, 69.

(*e*) Br. Ab. Covt. 20. Chantflower v. Priestley, Cro. Eliz. 914. Hayes v. Bickerstaff, Vaugh. 118. Tisdale v. Essex, Hob. 35. Dudley v. Follitt, 3 T. R. 587. Foster v. Pierson, 4 T. R. 617. 2 Saund. 178, notes, 5th edit.

(*f*) Hayes v. Bickerstaff, Vaugh. 119.

(*g*) Perry v. Edwards, 1 Str. 400. Fowle v. Welsh, 1 Barn. and Cres. 29. 2 Dowl. and Ryl. 133, S. C.

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because as it regards such acts as may arise from rightful claim, a man may well be supposed to covenant against all the world. It is, however, different where the individual is named, for there the covenantor is presumed to know the person against whose acts he is content to covenant, and may therefore be reasonably expected to stipulate against any disturbance from him, whether by lawful title or otherwise. (*a*) So where the covenant is against disturbance by the lessor, his heirs, or executors, it is a sufficient breach to allege, that he, or his heirs, or executors, entered, without shewing it to be a lawful entry, or setting forth his title to enter, for the plaintiff may maintain covenant, although the act done by the defendant was a mere trespass (*b*), and where the covenantor himself does any act asserting a title, it will be a breach of the covenant, although he covenanted against *lawful* disturbances only, and the act done by him was tortious, and might be the subject of an action of trespass. (*c*)

A covenant for quiet enjoyment against A., and any other person by his means, title, or procurement, is broken by the entry of A.'s wife, in whose name A. purchased jointly with his own name. (*d*) And if A. covenant for quiet enjoyment against all claiming, by, from, or under him, a claim of dower by his wife is a breach of the covenant; but otherwise, if the mother of A. claim her dower, because she does not claim by, from, or under him. (*e*) So a covenant for quiet enjoyment against A. or any person claiming under him, extends to a person deriving title under an appointment made by A., by virtue of a power in the creation of which he concurred. (*f*) A covenant for quiet enjoyment, quietly and clearly acquitted of and from all grants, &c. rents, rent charges, &c. whatsoever, has been held to extend to an annual quit-rent, payable to the lord of the manor, and incident to the tenure of the lands sold; though there were no arrears of the rent due. (*g*) Where the covenant was for quiet enjoyment against any interruption, of, from, or by the vendor,

(*a*) *Per* Lord Ellenborough. Nash v. Palmer, 5 M. and S. 374.

(*b*) Forte and Vine's case, 2 Roll. Rep. 21, (misprinted 19). Penning v. Plat, Cro. Jac. 383. 2 Saund. 181, a, notes, 5th edit.

(*c*) Lloyd v. Tomkies, 1 T. R. 671. Crosse v. Younge, 2 Show. 425. *Vide* Davie v. Sacheverell, 1 Rol. Ab. 429.

(*d*) Butler v. Swinerton, Palm. 339. Cro. Jac. 657, S. C.

(*e*) Godb. 333. Palm. 340.

(*f*) Hurd v. Fletcher, Dougl. 43.

(*g*) Hammond v. Hill, Com. Rep. 180.

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or his heirs, or any person whomsoever, legally or equitably claiming or to claim, any estate, &c. in the premises, by, from, under, or in trust for him or them, or by, through, or with his or their acts, means, *default*, privity, consent, or procurement; it was adjudged to extend to an arrear of quit-rent, due at the time of the conveyance, although it was not shewn that the rent accrued due during the time the vendor held the estate; for the court said, if it were in arrear in his lifetime, it was a consequence of law, that it was by his default, that is, by his default in respect of the party with whom he covenants to leave the estate unincumbered. (*a*)

Where a person holding under a lease, which contained a clause of re-entry in case the premises should be used for a shop, let the premises, and covenanted that the lessee should hold, without any lawful let, suit, trouble, molestation, eviction, interruption, claim, or demand, by the lessor, or any person claiming under him, or by his acts, means, right, title, forfeiture, privity, or procurement; and the under-lessee was not informed of the clause of re-entry in the original lease, and underlet to a tenant who incurred a forfeiture, by using the premises for a shop, and the original lessor evicted him, it was held that this was not an eviction by means of the lessor, within the covenant in the first underlease. (*b*)

If a lease contains a covenant for quiet enjoyment against the lessor, and those who claim under him, the lessee cannot, upon an eviction by one who has title paramount, recover under the covenant for title implied in the word demise. (*c*)

Construction of covenants to repair.

Where a lease contained a general covenant to repair, and it was likewise provided that the tenant, within three months from notice being served upon him by the landlord, should repair all defects specified in the notice; and the landlord served the tenant with such a notice, it was held that the former might proceed on a breach of the general covenant to repair before the three months had expired. (*d*) And so it was held, that a covenant by the lessee to leave the premises in repair at the expiration of

(a) Howes v. Brushfield, 3 East, 491. See Mr. Sugden's Observations on this case, Vend. and Purch. 552, 6th edit. And see Lady Cavan v. Pulteney, 2 Ves. Jun. 544.

(b) Spencer v. Marriott, 1 Barn. and Cres. 457.

(c) Merrill v. Frame, 4 Taunt. 329.

(d) Roe d. Goatly v. Paine, 2 Campb. N. P. C. 520.

the term, and also that the lessor might direct the lessee to complete the repairs, by giving six months' notice in writing, were distinct and separate covenants. (*a*) But where the covenant was "to repair the premises at all times, (as often as need or occasion should require) and at farthest within three months after notice," it was held to be one entire covenant, the former part of which was qualified by the latter. (*b*)

Construction of covenants to repair.

In what cases lessees were answerable at common law for accidental fires, and how that liability has been restrained by statute, has been already stated. (*c*) If a lessee, however, bind himself by an express covenant to repair, without any exception of damage by fire, and the house is burnt down, he must rebuild, although the fire was merely accidental. (*d*)

Fire.

As between landlord and tenant at a rack rent, where the rebuilding or repairing of the party walls becomes necessary, pursuant to the statute, 14 G. 3, c. 78, the tenant cannot be called upon to contribute to such rebuilding and repairs, by virtue of an express covenant to keep the premises in repair. (*e*)

Party-walls.

Where the lessee covenanted to pull down three houses demised to him, and in the same place to build three good and substantial houses, and also that he would during the term well and sufficiently repair all the houses so agreed to be built, and yield up the premises, &c. well repaired at the end of the term, it was held that the lessee having built *four* houses was bound to deliver up the fourth house also well repaired. (*f*) Where a lease was made of a piece of ground with certain messuages and tenements thereon, and the lessee covenanted to lay out the sum of 200*l.* within 15 years, in the erecting and rebuilding of messuages or tenements, or some other buildings upon the ground and premises, and from time to time, and at all times, all and singular the said messuages or tenements so to be erected, with all such other houses, edifices, &c. as should at any time or times there-

To what buildings, &c. they extend.

(*a*) Wood v. Day, 1 B. Moore, 369. 2 Roll. Rep. 259.

(*b*) Horsfall v. Testar, 1 B. Moore, 89.

(*c*) *Ante*, p. 121.

(*d*) Paradine v. Jane, All. 27. Earl of Chesterfield v. Duke of Bolton, Com. Rep. 627. Bullock v. Dommitt, 6 T. R. 650. 2 Chitty Rep. 608. See *ante*, p. 121, note, (*g*).

(*e*) Stone v. Grenwell, cited, 3 T. R. 461. Moor v. Clarke, 5 Taunt. 98. See further Southall v. Leadbetter, 3 T. R. 458. Peck v. Wood, 5 T. R. 130. Sangster v. Berkhead, 1 Bos. and Pul. 303. Taylor v. Reed, 6 Taunt. 249. Lamb v. Hemans, 2 Barn. and Ald. 467.

(*f*) Dowse v. Cale, 2 Ventr. 126. 3 Lev. 264, S. C. Vin. Ab. Covenant, (L. 3).

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after be erected, &c. to repair, &c., and *the said demised premises*, with all such other houses, &c. so well repaired, &c. at the end, or other sooner determination of the said term, to deliver up, &c.; the court held this to be a building lease, that the intent of the parties manifestly was that no part of the money should be laid out on the old buildings, and that pulling down these buildings was no breach of the covenant. (*a*) Where a lessee covenanted, that he would within the two first years of the term put the premises in good and sufficient repair, and would at all times during the term repair, &c. the messuages, &c. when, where, and so often as need should require, and would within the first fifty years of the term, take down four messuages as occasion might require, and in the place thereof, erect not less than four other good and substantial brick messuages; the court intimated an opinion, that if, within the fifty years, the four messuages demised should be so repaired as to make them completely and substantially as good as new houses, the covenant would be satisfied without taking down the old houses. (*b*)

A covenant by a tenant to yield up in repair at the expiration of his lease, all buildings which should be erected upon the demised premises, includes buildings erected and used by the tenant, for the purpose of trade and manufacture, if such buildings be let into the soil, or otherwise fixed to the freehold, but not where they merely rest upon blocks or pattens (*c*); and a lessee who has erected lime-kilns for the purposes of trade upon the demised premises, and afterwards takes a new lease to commence at the expiration of the former one, in which new lease there is a covenant to repair the erections, buildings, &c. will be bound to keep the lime-kilns in repair, unless strong circumstances exist to shew that they were not intended to pass under the general words of the second demise (*d*); so a lessee covenanting to keep in repair the premises, and all erections, buildings, and improvements, erected on the same during the term, and to yield up the same at the end of the term, cannot remove a veranda erected during the term, the lower part of which is affixed to the ground by means of posts. (*e*) So, where the lessee covenanted to repair the premises from the time of the lease to the

(*a*) Lant v. Norris, 1 Burr. 287.
(*b*) Evelyn v. Raddish, 7 Taunt. 411.
(*c*) Naylor v. Collinge, Taunt. 19, 2 Barn. and Cres. 614.
(*d*) Thresher v. East London Waterworks, 2 Barn. and Cres. 608.
(*e*) Administratrix of Penry v. Brown, 2 Stark. N. P. C. 403.

determination thereof, and to give them up at the end of the term, so well repaired, and afterwards built a malt-house upon the premises, the covenant was held to extend to such malt-house. (*a*)

Construction of covenants to repair.

Where the lessee covenanted to repair the houses, edifices, and buildings, with necessary reparations, and to keep the demised premises with paling and fencing, a breach assigned for not repairing the pavement of the court, and for carrying away the locks and keys of a cupboard, breaking the glass windows, and carrying away a shelf not shewn to be fixed, was held good. (*b*)

Breach.

If the covenant is to keep and leave the house in as good plight as it was in at the time of the making of the lease, it is said, that ordinary and natural decay is no breach of the covenant, but the covenantor is only bound to do his best, to keep it in the same plight, and therefore to keep it covered, &c. (*c*) And if a house is let for years, and the lessee covenants to leave it in as good a plight as he found it, and he throws down the house during the term, this is said to be no breach of the covenant until the end of the term, for the lessee may rebuild. (*d*) But upon a covenant to repair and *keep* in repair during the continuance of the term, an action for a breach of the covenant may be maintained before the term has expired. (*e*) Where the condition of a bond was, that the defendant should at all times *during the term*, maintain, sustain, and repair the two messuages demised, and the defendant pleaded that he had performed the condition in all, but as to one kitchen which was so ruinous at the time of the demise, that he could not maintain or repair, and therefore he took it down, and rebuilt it again in so short time as he could possibly, in the same place, so large, and so sufficient in breadth, length, and height, as the other kitchen was; and that the said kitchen at all times after the rebuilding thereof, he repaired, &c. on demurrer, the court held that though this might have been a good plea in an action of waste (*f*), it was bad when the defendant had by his own act tied himself to the inconvenience. (*g*)

(*a*) Brown v. Blunden, Skin. 121.

(*b*) Pyott v. Lady St. John, Cro. Jac. 329. 2 Bulstr. 102, S.C. See also Anon. 2 Vent. 214.

(*c*) Fitzh. Ab. Cov. 4. Sheph. Touchs. 169. Gilb. Cov. 149.

(*d*) Sheph. Touch. 173. F.N.B. 145. L. See Evelyn v. Raddish, 7 Taunt. 415, and Cordwent v. Hunt, 2 B. Moore, 665.

(*e*) Luxmore v. Robson, 1 B. and A. 584.

(*f*) *Ante*, p. 243.

(*g*) Wood v. Avery, 2 Leon. 189.

Construction of covenants to repair.

If a man covenant to repair, or sustain a house, and the house be burnt or thrown down by a tempest or the like, the covenant is not broken by this accident only; but it will be broken if the covenantor do not repair within a reasonable time. (*a*)

The breaking a door-way through the wall of a demised house into an adjoining house, amounts to a breach of a covenant to repair. (*b*)

The lessee who covenants to repair, must repair during the term, for if he enter for that purpose after the term is expired, he will be a trespasser. (*c*)

Damages.

Where the plaintiff, who sued on a breach of a covenant to repair was only tenant for life, Gibbs, C. J. ruled, that he could only recover such an amount of damages as was commensurate with the injury done to the life estate. (*d*)

Construction of covenants respecting cultivation.

Where a tenant agrees to occupy a farm *in a good and husbandlike manner, and according to the custom of the country*, he must conform to the prevalent usage of the country, where the lands lie, and such an agreement is broken, if he till *half* his farm at once, when no other farmers there tilled more than a third, though many tilled only a fourth (*e*); and it seems that a contract to occupy an estate in *a good and husbandlike manner*, simply, will impose the same duty upon a tenant. (*f*) Where a lessee covenanted, that he would at all times, during the term, plough, sow, manure, and cultivate the demised premises (except the rabbit warren and sheep walk) in a due course of husbandry, and during the term ploughed the rabbit warren and sheep walk; the covenant was held to be broken. (*g*) Where a lessee covenanted to deliver up all the trees standing in an orchard at the time of the demise, reasonable use and wear only excepted, and removed trees decayed and past bearing from a part of the orchard which was too crowded, the covenant was held not to be broken. (*h*)

(*a*) Sheph. Touch. 173. Dyer, 33, a. Com. Dig. Cov. (E. 3).

(*b*) Doe d. Vickery v. Jackson, 2 Starkie, N. P. C. 293.

(*c*) 2 Roll. Rep. 250.

(*d*) Evelyn v. Raddish, Holt, N. P. C. 543. 7 Taunt. 411, S. C. but not S. P. As to damages in action by heir, see Vivian v. Campion, 1 Salk. 141, *post*.

(*e*) Legh v. Hewitt, 4 East, 154. See Powley v. Walker, 5 T. R. 373.

(*f*) *Per* Lord Ellenborough, Legh v. Hewitt, 4 East, 159, 5 T. R. 373.

(*g*) Duke of St. Albans v. Ellis, 16 East, 352.

(*h*) Doe d. Jones v. Crouch, 2 Camp. N. P. C. 449.

Construction of covenants respecting cultivation.

An usage for the landlord to pay a sum of money as a compensation to the outgoing tenant for the away-going crop, is a good usage (*a*), and so a custom that the tenant shall have the away-going crop is good, though the demise be by deed. (*b*) Where the outgoing tenant covenanted with his landlord to leave the manure made by him on the farm, and to sell it to the in-coming tenant at a valuation to be made by certain persons, it was held that the effect of such covenant was to give the outgone tenant a right of onstand for his manure on the farm, and that the possession of, and property in it remained in him, in the meantime, so that if the in-coming tenant removed and used it before valuation, he should be answerable in trespass. (*c*)

Where a man takes land sowed or stocked with cattle, and covenants to leave it in the same plight, he must leave it sown, and if the cattle die, he must supply their number. (*d*)

In covenant by a lessor against a lessee, upon a lease reserving an increased rent for every acre of certain lands converted into tillage, the jury by their verdict having given damages for the actual injury sustained, instead of the increased rent, although directed by the judge to find damages to the amount of the increased rent, the court granted a new trial without payment of costs. (*e*)

By statute, 56 Geo. 3, c. 50, the sheriff is prohibited from selling or carrying off the farm, straw, &c. which, according to any covenant or written agreement, ought not to be carried off, notice of such covenants or agreements having been given; this act does not bind the crown. (*f*)

Construction of covenants not to assign.

Executors.

Where a lease contains a proviso that the lessee, his executors, or *administrators*, shall not sell, let, or assign over the premises, without the licence of the lessor *in writing*, the administratrix of the lessor cannot underlet without incurring a forfeiture, for it was competent for the party to bind his representative, and a *parol* licence does not waive the proviso. (*g*) And where the words of

(*a*) Senior v. Armytage, Holt's N. P. C. 197. Dalby v. Herst, 1 Brod. and Bing. 224.

(*b*) Wigglesworth v. Dallison, Dougl. 201. See 1 Bligh, 312.

(*c*) Beaty v. Gibbons, 16 East, 117. See Boraston v. Green, 16 East, 71. Davis v. Connop, 1 Price, 53.

(*d*) Prest. She p. Touch. 174.

(*e*) Farrant v. Olmius, 3 B. and A. 692.

(*f*) R. v. Osbourne, 6 Price, 94.

(*g*) Doe d. Gregson v. Harrison, 2 T. R. 425, and see Doe d. Goodbehere v. Bevan, 3 M. and S. 357.

Construction of covenants not to assign.

the covenant were, that the lessee, "his executors, administrators, or assigns, should not, nor would, at any period during the term, assign over, or otherwise part with that indenture, or the demised premises, to any person, &c. except by his, or their last will and testament, without licence, &c." and the lessee died, and bequeathed the lease to his widow, and made her and others his executors, and there was no assent to the bequest to the widow; it was held that the executors could not *assign* without licence. (*a*) But in a case where the question arose, whether executors were warranted in disposing of a lease as assets of the testator, in which there was a proviso against alienation *by the lessee*, Lord Thurlow, C. said, "If A. lets a farm to B. with a covenant not to alien, and B. dies, may not his executors dispose of the term? I think it has been determined that they may, and I have always taken it to be clear law. It is an alienation by the act of God. I remember Lord Camden entered into the question much in the same way. He took it to be clear law that an alienation by death, could not be a forfeiture. In the case of a lease for years to A. it goes to his executors, not by way of limitation, as in the case of remainders over, &c.; but it goes to them as coming in the place of the lessee. I understood it to be well settled as I have stated. But I do not mean to lay it down, that a man may not by a clause in his will provide, that in case of a devolution to executors it shall not be alienable by them, but it must be very special for that purpose." (*b*)

Assigns.

It is said, that a covenant not to assign *generally* being quite personal and collateral, can only affect the lessee himself, and is so far from being meant to reach the assigns, that it is inserted to prevent there ever being any assigns at all (*c*); but where the lessee covenants for himself, *and his assigns* not to assign, there may, perhaps, exist cases in which such a covenant shall have operation. Thus in a lease upon condition, that neither the lessee nor *his assigns* should grant, a grant by the administrator was held to be a breach of the condition (*d*); and so where the lessee covenants for himself and his assigns, not to assign, ex-

(*a*) Lloyd v. Crispe, 5 Taunt. 249, 254.

(*b*) Seers v. Hind, 1 Ves. J. 296. Shep. Touch. 144.

(*c*) Bally v. Wells, Wilmot's cases, 351.

(*d*) Dyer, 6 b. (margin.) See Moor, 44.

cept to a particular person, it might be contended that this covenant would extend to prevent the latter from assigning. (*a*) And so where a man covenants for himself and his assigns, not to assign to *a particular person*, it is said by Wilmot, C. J. that such a covenant would bind the assignee, for that it falls within every rule laid down in Spencer's case. (*b*)

Construction of covenants not to assign.

Where the word assigns is used in a proviso, or covenant not to assign, the courts have construed it to mean voluntary assigns, as contradistinguished from assigns by operation of law, and have held that the immediate vendee from the assignee in law is not within the proviso. (*c*) An assignment, by operation of law, therefore, will not amount to a forfeiture. Thus the sale of a lease under a *bonâ fide* execution against the lessee is not a forfeiture of a condition not to assign; but if the tenant give a warrant of attorney to his creditor for the express purpose of enabling him to take the lease in execution, this will be a fraud and a breach of the condition. (*d*) So, if the lessee become bankrupt, an assignment under the commission is no breach of a condition or covenant not to assign. (*e*) And where a lease contained a proviso, that the lessee, his executors, or administrators, should not underlet, &c.; and the lessee became bankrupt, and the lease was assigned under the commission, and the lessee obtained his certificate, and the premises were re-assigned to him, after which he underlet, it was held that such underletting was no forfeiture of the lease. (*f*) The lessor may however guard against such assignments, by inserting a proviso for re-entry upon the tenants committing an act of bankruptcy, whereon a commission shall issue (*g*), or by making the lease depend on the actual occupancy of the premises by the lessee. (*h*)

Assignment by operation of law.

It seems doubtful, whether a *devise* by will is a breach of a

Whether a devise be a breach.

(*a*) Thornhill v. King, Cro. Eliz. 757. Dyer, 152, a. Prest. Shep. Touch. 145, but see Dumpor's case, 4 Rep. 120, b. Brummel v. Macpherson, 14 Ves. 176. Com. Dig. Condition, (Q).

(*b*) Bally v. Wells, Wilmot's cases, 352.

(*c*) Doe d. Goodbehere v. Bevan, 3 M. and S. 358.

(*d*) Doe d. Mitchinson v. Carter, 8 T. R. 57. Doe d. Lord Stanhope v. Skegge, cited 2 T. R. 134.

(*e*) Goring v. Warner, 2 Eq. Ca. Ab. 100. Philpot v. Hoare, 2 Atk. 219. Amb. 480, S. C. Doe d. Goodbehere v. Bevan, 3 M. and S. 353.

(*f*) Doe d. Cheere v. Smith, 1 Marsh. 359, 5 Taunt. 795, S. C.

(*g*) Roe d. Hunter v. Galliers, 2 T. R. 133.

(*h*) Doe d. Lockwood v. Clarke, 8 East, 185. Doe d. Duke of Norfolk, v. Hawke, 2 East, 481.

Construction of covenants not to assign.

covenant, or condition not to *assign*. The weight of authorities appears to be in favour of the affirmative. (*a*)

Pledging the deed.

Where a tenant covenanted, "not to set, assign, transfer, or otherwise part with the premises demised, or the lease," it was held that depositing the lease as a security was not a breach of the covenant. (*b*)

Under-leases.

Where the lessee covenanted "not to assign, transfer, or set over, or otherwise do, and put away the indenture of demise or the premises thereby demised, or any part thereof," an under-lease has been held *not* to be a breach of the covenant. (*c*) But where the proviso in a lease was "not to *set*, *let*, or assign over the said demised premises, or any part thereof," an under-lease was considered to be within the terms of the proviso. (*d*) And where a lease contained a proviso for re-entry in case the lessee "should demise, lease, grant, or let the premises, or any part or parcel thereof, or convey, alien, assign, or set over the indenture, or his estate therein, or any part thereof for all or any part of the term," and the lessee entered into partnership with A. and agreed that he should have the use of a back-room and other parts of the premises exclusively, the lease was held to be forfeited. (*e*) So where in a lease for years the proviso was "not to assign, or otherwise part with the indenture of lease, or the premises thereby demised, or any part thereof, for the whole or any part of the term thereby granted," it was held by Lord Ellenborough that this condition was broken by an agreement to grant a lease of the premises for the residue of the term, reserving a few days, under which possession was given. (*f*) But a covenant not to underlet is not broken by admitting a lodger for above a twelvemonth into the exclusive possession of a room. The covenant, said Lord Ellenborough, can only extend to such under-

(*a*) That it is a forfeiture, see Berry v. Taunton, Cro. Eliz. 331. Poph. 106, S. C. Knight v. Mory, Cro. Eliz. 60. 1 Rol. Ab. 428. Boroughs v. Windsor, cited, Moor, 351. Horton v. Horton, Cro. Jac. 75. Dyer, 45, b. 3 Leon. 67. Shep. Touch. 144. That it is not a forfeiture, see Fox v. Swann, Styles, 482, and *dicta* in Crusoe v. Bugby, 3 Wils. 237. Doe v. Bevan, 3 M. and S. 361.

(*b*) Doe d. Pitt v. Hogg, 4 D. and R. 226.

(*c*) Crusoe d. Bleucowe v. Bugby, 3 Wils. 234. 2 W. Black. 766, S. C.

(*d*) Roe v. Harrison, 2 T. R. 425. A lease by the lessee for the whole term amounts to an assignment, though the rent be reserved to the lessee, and a power of re-entry given to him. Palmer v. Edwards, Dougl. 186, n, but see Poultney v. Holmes, 1 Str. 405.

(*e*) Roe d. Dingley v. Sales, 1 M. and S. 297.

(*f*) Doe d. Holland v. Worsley, 1 Campb. N. P. C. 20.

letting as a licence might be expected to be applied for, and who ever heard of a licence from a landlord to take in a lodger (*a*)?

Construction of covenants not to assign.

If the lessor licence the lessee to assign the premises, the covenant or condition not to assign without licence, is wholly discharged, and all subsequent assignees may assign without licence (*b*); and a licence to alien *part* of the land dispenses with the condition as to the residue. (*c*) Whether the licence be general, or particular, as to one particular person, the condition is gone, and the assignee may assign without further licence. (*d*) Where a demise is to three, upon condition that neither they, nor any one of them, shall alien without licence, and the lessor licences one of them to alien, the condition is determined as to the other two. (*e*) Where the lease requires the licence to be in writing, a parol licence is insufficient. (*f*)

How discharged.

In the leading case upon this subject (*g*), the following rules are laid down with regard to the construction of covenants running with the land. Where the covenant extends to a thing *in esse*, parcel of the demise, the thing to be done by force of the covenant is *quodammodo* annexed, and appurtenant to the thing demised, and shall go with the land, and shall bind the assignee, though he be not bound by express words; but when the covenant extends to a thing which is not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which has no being; as if the lessee covenants to repair the houses demised to him, during the term, that is parcel of the contract and extends to the support of the thing demised, and therefore is *quodammodo* annexed, and appurtenant to houses, and shall bind the assignee although he be not expressly bound by the covenant. But if the lessee had covenanted for him and his assigns, that they would make a new wall upon some part of the thing

Construction of covenants running with the land.

(*a*) Doe d. Pitt v. Laming, 4 Campb. N. P. C. 77. 15 Ves. 265.

(*b*) Dumpor's case, 4 Rep. 119. Dumpor v. Syms, Cro. Eliz. 815, S. C. Walker v. Bellamy, Cro. Jac. 104.

(*c*) *Ib. quære* whether a licence to underlet dispenses with the condition altogether. See 1 Saund. 288, new notes.

(*d*) Brummel v. Macpherson, 14 Ves. 173, and see Whitchcot v. Fox, Cro. Jac. 398.

(*e*) Leeds v. Crompton, cited 4 Rep. 120, a. 1 Rol. Ab. 472, S. C. Noy. 32.

(*f*) Roe d. Gregson v. Harrison, 2 T. R. 425. Seers v. Hind. 1 Ves. 294.

(*g*) Spencer's case, 5 Rep. 16, a.

Construction of covenants running with the land.

demised, then for as much as it is to be done upon the land demised, it shall bind the assignee; for although the covenant does extend to a thing to be newly made, yet it is to be made upon the thing demised, and the assignee is to take the benefit of it, and therefore, it shall bind the assignee by express words. But although the covenant be for him and his assigns, if the thing to be done be merely collateral to the land, and does not touch or concern the thing demised in any sort, there the assignee shall not be charged. As if the lessee covenants for him and his assigns to build a house upon the land of the lessor, which is no parcel of the demise, or to pay any collateral sum to the lessor, or to a stranger, it shall not bind the assignee, because it is merely collateral, and in no manner touches or concerns the thing that was demised, or that is assigned over, and therefore, in such case, the assignee of the thing demised cannot be charged with it, no more than any other stranger.

1. Covenants extending to a thing *in esse* parcel of the demise, and binding the assignee though not named.

Where the covenant extends to a thing *in esse* parcel of the demise, it is *quodammodo* annexed and appurtenant to the thing demised, and binds the assignee though he be not named. Thus a covenant to repair will bind the assignee though not named, for it is a covenant which extends to the support of the thing demised, and is therefore *quodammodo* appurtenant to it and goes with it (*a*). So a covenant to leave a certain portion of land every year for pasture, binds the assignee though not named, because it is for the benefit of the estate, according to the nature of the soil (*b*); and in general where a covenant relates to the improvement, melioration, and mode of cultivation of an estate, it binds the assignee though not named (*c*). So also, a covenant to reside constantly on the demised premises during the term, is a covenant which runs with the land, and binds the assignee without special words (*d*). A covenant for the payment of rent, is within the same rule (*e*); so a covenant to retain a portion of the rent (*f*); and where A. being seised in fee of a mill, and of

(*a*) Dean and Chapter of Windsor's case, 5 Rep. 24, a. Spencer's case, 5 Rep. 17, b.

(*b*) Cockson v. Cock, Cro. Jac. 125.

(*c*) *Per* Wilmot, C. J. Baily v. Wells, Wilmot's cases, 346. As to covenants to grind corn at the plaintiff's mill, see Ld. Uxbridge v. Staveland, 1 Ves. 56. Hamley v. Hendon, 12 Mod. 327, and see *ante*, p. 357.

(*d*) Tatem v. Chaplin, 2 H. Blacks. 133.

(*e*) Attoe v. Hemmings, 2 Bulstr. 281. Isherwood v. Oldknow, 3 M. and S. 382. Com. Dig. Cov. (C. 3).

(*f*) Baylye v. Offord, Cro. Car. 137.

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certain lands, granted a lease of the latter for years, the lessee yielding and paying to the lessor, his heirs and assigns, certain rents, &c., and also doing suit to the mill of the lessor, his heirs and assigns, by grinding all such corn there as should grow upon the demised premises, it was held that the reservation of suit to the mill was in the nature of rent, and that the implied covenant to render it resulting from the *reddendum* was a covenant that ran with the land. (*a*) A covenant to supply the premises demised with water, is a covenant running with the land, for it respects the premises demised, and the manner of enjoyment. (*b*) Where on a demise of tithes, the lessee covenanted for himself, his executors, administrators, *and assigns*, not to let any of the farmers occupying certain lands, have any part of the tithes without the consent of the lessor; this was held to be a covenant running with the land, and Wilmot, C. J. in delivering the judgment of the court, added, that if the covenant had not named assigns, it might be very plausibly argued, that it would have bound the assignee as effectually as a covenant to repair or occupy the estate in the manner prescribed by the lessor. (*c*) A covenant to insure against fire premises situate within the weekly bills of mortality, mentioned in the statute 14 Geo. 3, c. 78, (the effect of which statute is to enable the landlord by application to the governors or directors of the insurance office, to have the sum insured laid out in re-building the premises) is a covenant that runs with the land as much as a covenant to repair or re-build in case of a damage by fire. (*d*) A covenant that a lessor will at the end of the term grant another lease, runs with the land. (*e*)

Where the lessee covenants to let the lessor have a thing out of the demised premises, as a common or other profit *à prender*, this covenant runs with the land, and binds the assignee. (*f*)

The usual covenants for title run with the land, as the covenant that the vendor was seised in fee, and had good right

(*a*) Vyvyan v. Arthur, 1 Barn. and Cres. 410.

(*b*) Jourdain v. Wilson, 4 Barn. and Ald. 266.

(*c*) Bally v. Wells, Wilmot's cases, 349, 3 Wils. 25, S. C. Mayor of Congleton v. Pattison, 10 East, 134, 136.

(*d*) Vernon v. Smith, 5 Barn. and Ald. 1. If the premises were in any other part of the kingdom, this would be a covenant that would pass to an assignee. *Per* Best, J. *Ibid.*

(*e*) Moor, 159, recognised in Vernon v. Smith, 5 B. and A. 11. Isteed v. Stonely, And. 82. 12 East, 469.

(*f*) Coles's case, 1 Salk. 196.

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to convey (*a*) for further assurance (*b*), and for quiet enjoyment. (*c*)

Where the covenant relates to a thing not *in esse*, but to be done upon the land demised, the assignee is bound if named. (*d*)

2. Covenants relating to a thing not *in esse*, but to be done on the thing demised, &c.

To carry the lien of a personal obligation over to the assignee, he must in all cases, where something is to be done *de novo*, be expressly named (*e*), and the thing to be done must affect the nature, quality, value, or mode of enjoyment of the thing demised, independently of collateral circumstances. (*f*) Where a lessee of tithes covenanted for himself, his executors, administrators, and assigns, not to let any of the farmers of certain lands, have any part of the tithes without the consent of the lessor; it was held, that this covenant followed the lease into the hands of the assignee, and bound him to the performance of it. (*g*)

3. Collateral covenants.

If the covenant is merely collateral to the land, and does not touch or concern it in any sort (*h*), it cannot run with the land, and will not bind the assignee, though he be named. Thus a covenant for the payment of an annual sum, or to build a house on other land, is merely collateral, for the thing covenanted to be done has not the least reference to the land, it is a substantive, independent agreement, not *quodammodo*, but *nullo modo* annexed, or appurtenant to the land. (*i*) So, where in a lease of ground, with liberty to make a watercourse and erect a mill, the lessee covenanted for himself, his executors, administrators, and assigns, not to hire persons to work in the mill who were settled in other parishes, without a parish certificate, this was held to be a collateral covenant, not running with the land, since it did not affect the nature, quality, value, or mode of enjoyment, of the thing demised. (*k*) A covenant by the lessee of a tavern, to account monthly to the lessor, for all the wines which shall be there sold, and to pay to the lessor, or his assigns, 20*s*. for each

(*a*) Kingdon v. Nottle, 4 M. and S. 53.

(*b*) Middlemore v. Goodale, Cro. Car. 503.

(*c*) Campbell v. Lewis, 3 Barn. and Ald. 392.

(*d*) Spencer's case, 5 Rep. 16, b. Bally v. Wells, Wilmot's cases, 344.

(*e*) *Per* Wilmot, C. J. Bally v. Wells, Wilmot's cases, 345.

(*f*) *Per* Lord Ellenborough, Mayor of Congleton v. Pattison, 10 East, 135.

(*g*) Bally v. Wells, Wilmot's cases, 341. 3 Wils. 25, S. C. *Ante*, p. 437.

(*h*) Spencer's case, 5 Rep. 16, b.

(*i*) Mayho v. Buckhurst, Cro. Jac. 438. Bally v. Wells, Wilmot's cases, 345.

(*k*) Mayor of Congleton v. Pattison, 10 East, 130.

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tain sold, is a collateral covenant. (*a*) So where the lessor has freehold and leasehold property lying together, and covenants in a lease of parcel, that if he, his heirs, or assigns, shall during the term have any advantageous offer of disposing of a certain adjoining freehold parcel, he (the lessor) his heirs, or assigns, will not dispose of the same without previously making an offer of that parcel to the lessee, his executors, administrators, or assigns, at five *per cent.* less than that offer; this covenant is merely collateral. (*b*) So a covenant by a purchaser of land to produce the title deeds, does not run with the land, so as to bind his assignee. (*c*)

A term of years was limited to A., for securing a sum of money, and the defendant in the mortgage deed covenanted with A. his executors, administrators, and assigns, to pay the money at a certain day; and after that day A. died, having bequeathed to the plaintiff the term so secured, and appointed the plaintiff and another his executors. The co-executor assented to the bequest. In an action on the covenant brought by the plaintiff in his own right, it was held that he was not entitled to sue as assignee; first, because the covenant was merely personal, and secondly, because the breach occurred in the testator's lifetime. (*d*)

It has been said that if tenant in fee grant a rent charge out of lands, and covenant to pay it without deduction for himself and his heirs, covenant may be maintained against the grantor and his heirs, but not against his assignee, for it is a mere personal covenant, and cannot run with the land. (*e*) If indeed the position laid down by Lord Kenyon (*f*) be correct, that it is not sufficient that a covenant is *concerning the land*, but in order to make it run with the land, *there must be a privity of estate between the covenanting parties*, the above *dictum* must be

(*a*) Purefoy's case, Moore, 243. Godb. 120. Canham v. Rust, 8 Taunt. 231. Vin. Ab. Cov. (K. 3, 11). Lord Kenyon thought it doubtful whether a covt. that the lessee and her assigns would purchase all the beer consumed on the premises, at the plaintiff's brewery, was collateral. Hartley v. Peball, Peake's N. P. C. 131. See James v. Blunck, Hardres, 88.

(*b*) Admitted in Collison v. Lettsom, 6 Taunt. 224.

(*c*) Barlay v. Raine, 1 Sim. and Stu. 449.

(*d*) Canham v. Rust, 8 Taunt. 227. 2 B. Moore, 164, S. C.

(*e*) *Per* Holt, C. J. Brewster v. Kedgill, 1 Ld. Raym. 317. Salk. 198. 5 Mod. 369. S. C. See Bally v. Wells, Wilmot's cases, 349.

(*f*) Webb v. Russel, 3 T. R. 402, but see *post*, Pakenham's case, p. 443.

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admitted to be law, for there is certainly no privity of estate between the assignee and the grantee of the rent charge.

A covenant to pay a rent charge will not run with the rent charge, so as to enable an assignee of such rent charge to sue upon it. Thus, where J. B. being seised in fee, conveyed to the defendant and T. J., their heirs and assigns, to the use that J. B., his heirs and assigns, might have and take to his use a rent certain, to be issuing out of the premises, and subject to the said rent to the use of the defendant, his heirs and assigns, and defendant covenanted with J. B., his heirs and assigns, to pay to him, his heirs and assigns, the said rent, and to build within one year one or more messuages on the premises, for better securing the said rent, and J. B. within one year demised the said rent to plaintiffs for one thousand years. It was held that covenant would not lie for the plaintiff for non-payment of the rent, or for not building the messuages, for the covenant was personal to J. B. (*a*)

A covenant "not to assign" generally appears to be personal to the lessor and lessee (*b*), and is therefore merely collateral and cannot run with the land. (*c*) It can only affect the lessee himself, and is so far from being meant to reach the assigns, that it is inserted to prevent there being any assigns at all. (*d*) However, where the lessee covenants for himself and his assigns, not to assign to a particular person, such a covenant would, as it seems, run with the land and bind the assignee. (*e*)

Where the lease is of sheep or other personal goods, the assignee, whether named or not, can never be bound by any covenant relating to them, for there is no privity as in the case of real property between the lessor and lessee, and his assigns. (*f*)

By whom.

Lessor.

The lessor or the assignee of the reversion may maintain covenant for a breach of covenant committed while the reversion was in him, though he has assigned it, or been deprived of it, before action brought. (*g*)

(*a*) Milnes v. Branch, 5 M. & S. 411.
(*b*) Prest. Shep. Touch. 145.
(*c*) Pennant's case, 3 Rep. 64, a. Collins v. Silley, Styles, 265.
(*d*) Bally v. Wells, Wilmot's cases, 351.
(*e*) *Ibid.* 352, and see *ante*, p. 435.
(*f*) Spencer's case, 5 Rep. 16, b. Bally v. Wells, Wilmot's cases, 344, 345.
(*g*) Athowe v. Hemming, 1 Rol. Rep. 82. Midgley v. Lovelace, Carth. 290.

By whom.

Heir.

The heir is entitled, at common law, to sue on a covenant made with his ancestor, and running with the land, for he is privy in blood, and not merely privy in estate, like the assignee of a reversion (*a*); and, therefore, where a lessee for years covenanted with the lessor and his *executors* to repair, it was held, that the heir might sue on such covenant, though he was not named (*b*); and so where a vendor covenanted with A. and his heirs for further assurance upon request, and a request was made by A. in his lifetime to have a fine levied, but no such fine was levied, and A. was not evicted during his lifetime, but the heir of A. was afterwards evicted, it was held, that the heir might maintain an action for the breach accrued in the ancestor's lifetime, by the request and refusal (*c*), for the ultimate damage had not accrued in the lifetime of the testator. But where the ultimate damage is sustained in the lifetime of the ancestor, as where he is evicted, and the land, and consequently the covenant, do not descend to the heir, in such case the executor only can sue upon the covenant. (*d*) Where the heir assigned a breach in covenant, that the premises were out of repair *tali die et per* 10 *annos*, which included part of his ancestor's time; after verdict for the plaintiff, it was moved in arrest of judgment, that part of the ten years incurred in the life of the ancestor; but it was held by Holt, C. J., that if the premises were out of repair in the time of the ancestor, and continued so in the time of the heir, it was a damage to the heir, and the jury must give as much in damages as will put the premises into repair, but that thereby no damages are given in respect of the time the premises continued in decay, but in respect of what it will cost at the time of action brought to put the premises in repair; wherefore *per decem annos* was frivolous. (*e*)

Executor.

It appears from what is said above, that where by a breach of a covenant relating to land, in the time of a testator, the personal estate of the testator is lessened, his executor, and not his heir, is the proper party to sue. Whenever the reversion is for

(*a*) F. N. B. 145 C. Webb v. Russell, 3 T. R. 402. Com. Dig. Cov. (B. 2). Shep. Touch. 175.

(*b*) Longher v. Williams, 2 Lev. 92.

(*c*) King v. Jones, 5 Taunt. 417, 418. 1 Marsh. 107, S. C. affirmed on error, 4 M. and S. 188.

(*d*) Lucy v. Levington, 2 Lev. 26. 1 Vent. 175, S. C. Kingdon v. Nottle, 1 M. and S. 363, 366. King v. Jones, 5 Taunt. 427.

(*e*) Vivian v. Campion, 1 Salk. 141. Holt, 178, S. C.

By whom.

years, the executor is of course the only party capable of suing on a covenant made with the lessor. Where A. and B. his wife by indenture, demised lands to C. for twenty-one years, and covenanted, that they (A. and B.) would, at the end of twenty-one years, make a good lease to C. and his assigns for twenty-one years, commencing at the expiration of the first term, and during the first term the lessee died, having made his will, and appointed D. his executrix, who entered, &c., and died, having made her will and appointed the plaintiff her executor, who entered, &c., and at the expiration of the first term, A. and B. refused to grant the further lease, it was held that the plaintiff might maintain an action on this covenant against A. the husband. (*a*)

An executor of tenant for years, is expressly within the statute of 32 Hen. 8, c. 24, and may maintain covenant against the assignee of the reversion.

Assignee.

At common law, whenever a covenant is entered into, which runs with the land, the assignee of the land is, as such, entitled to take advantage of it. Thus where the vendor of an estate in fee covenanted with the feoffee, his heirs and assigns, for further assurance, it was held, that the assignee might maintain an action for a breach of that covenant in his own time. (*b*) And so where A., being possessed of certain premises for a term of years, assigned part of them over to B. for the residue of the term, with a covenant for quiet enjoyment, and B. afterwards assigned them over to C., it was held, that C., having been evicted by the lessor of A. for a breach of covenant committed by A. previously to the assignment to B. might maintain an action against A. upon the covenant for quiet enjoyment. (*c*) In these cases there was a privity of estate between the parties, upon which ground, Abbot, C. J. held the action in the latter case to be maintainable. It is said by Lord Kenyon, that it is not sufficient that a covenant is *concerning* the land; but in order to make it run with the land, there must be a privity of estate between the covenanting parties (*d*); but there appear to be some cases in which the courts have held, that a covenant may run with land, and the assignee be entitled to sue upon it, although there exists no pri-

(*a*) Chapman v. Dalton, Plowd. 286.

(*b*) Middlemore v. Goodale, Cro. Car. 503.

(*c*) Campbell v. Lewis, 3 Barn. and Ald. 392. Noke v. Awder, Cro. Eliz. 373, 436.

(*d*) Webb v. Russell, 3 T. R. 402.

vity of estate between the parties. Thus in Pakenham's case (*a*), there being grandfather, father, and son, and the grandfather being seised of the manor of D. whereof a chapel was parcel, a prior, with the consent of his convent, by deed covenanted for him and his successors, with the grandfather and his heirs, that he and his convent would sing all the week in his chapel, parcel of the said manor, for the lords of the said manor, and their servants, &c. The grandfather enfeoffed one of the manor in fee, who gave it to his younger son and his wife in tail; and it was adjudged, that the tenants in tail, as terretenants, (for the elder brother was heir,) should have an action of covenant against the prior; for the covenant is to do a thing which is annexed to the chapel which is within the manor, and so annexed to the manor. But if, says Sir Edward Coke, the covenant had been with a stranger, to celebrate divine service in the chapel of A. and his heirs, the assignee could not have had an action of covenant, for the covenant could not be annexed to the manor, because the covenantee was not seised of the manor. (*b*)

By whom.

The assignee of the reversion may bring covenant without giving notice of the assignment to the lessee (*c*); but if the lessee has paid over the rent to the lessor, before notice of the assignment, such rent cannot be recovered. (*d*)

Those who come to the land by act of law, as tenant by statute merchant, statute staple, or *elegit*, or the purchaser of a lease for years under an execution, are entitled to maintain covenant. (*e*) The assignee of the assignee may have covenant; so the executors of the assignee of the assignee of a term; and the assignees of the executors or administrators of an assignee of a term. (*f*) And a devisee may maintain an action on a covenant running with the land, for a breach in the testator's lifetime, if it be a continuing breach in the time of the devisee. (*g*)

An assignee may take advantage of a covenant in law running with the land, as well as of a covenant in deed. (*h*)

But at common law a covenant could only run with *the land*,

(*a*) 42 Ed. 3, 3, a. Br. Ab. Cov. 5. Co. Litt. 385, a. Spencer's case, 5 Rep. 17, b. Shep. Touch. 177; and see Vyvyan v. Arthur, 1 Barn. and Cres. 415.

(*b*) Co. Litt. 385, a.

(*c*) Bull. N. P. 160.

(*d*) Stat. 4 Anne, c. 16, s. 9.

(*e*) Spencer's case, 5 Rep. 17, a. Shep. Touch. 176.

(*f*) Spencer's case, 5 Rep. 17, b.

(*g*) Kingdon v. Nottle, 4 M. and S. 53.

(*h*) Nokes's case, 4 Rep. 80, b. Vyvyan v. Arthur, 1 B. and C. 410.

By whom.

and not with the reversion: and, therefore, the assignee of a reversion could neither maintain covenant against the lessee, nor be sued by him in covenant. (*a*) In order to remedy this inconvenience, the statute of 32 Hen. 8, c. 34, was passed.

Assignee of reversion.

This statute, after reciting, that many temporal and religious persons had made leases and grants of land for life or lives, or for term of years, by writing under seal, containing conditions and covenants, to be performed as well on the part of the lessees and grantees, their executors and assigns, as on the part of the lessors and grantors, their heirs and successors: and that by the common law, no stranger to any covenant could take advantage thereof, but only such persons as were parties or privies thereunto, by reason whereof grantees of reversions, and grantees and patentees of lands lately belonging to religious houses were excluded from any entry or action against the lessees and grantees, their executors and assigns, for breach of any condition or covenant, enacts, that all persons and bodies politic, their heirs, successors, and assigns, having any gift or grant of the king, of any lands or other hereditaments, or of any reversion of the same, which belonged to any of the monasteries, &c., dissolved, or by any other means come to the king's hands, since the fourth day of February, A. D. 1535, or which at any time theretofore belonged to any other person, and after came to the hands of the king, and all other persons being grantees or assignees to or by the king, or to or by any other person than the king, and their heirs, executors, successors, and assigns, should and might have and enjoy like advantages against the lessees, their executors, administrators, and assigns, by entry for non-payment of the rent, or for doing waste or other forfeiture, and also should and might have and enjoy all and every such like and the same advantage, benefit, and remedies, by action only, for not performing other conditions, covenants, or agreements expressed in the indentures of leases, demises, and grants, against the said lessees, farmers, and grantees, their executors, administrators, and assigns, as the said lessors and grantors, their heirs or successors,

(*a*) There are indeed *dicta*, that covenant lay in some cases at common law, for the assignee of the reversion. See Harper v. Burgh, 2 Lev. 206. Vyvyan v. Arthur, 1 Barn. and Cres. 414. Isherwood v. Oldknow, 3 M. and S. 388, 394, 401. Thursby v. Plant, 1 Saund. 240, 5th edit. and note (3). See also the new note there, (o). Barker v. Damer, 3 Mod. 338. Thrale v. Cornwall, 1 Wils. 165.

By whom.

might have had or enjoyed at any time in like manner and form as if the reversion of such lands, &c. had not come to the hands of the king, &c. By s. 2, all farmers, lessees, and grantees of lands or other hereditaments for term of years, life, or lives, their executors, administrators, and assigns, shall have like action, advantage, and remedy, against all persons and bodies politic, their heirs, successors, and assigns, having any gift or grant of the king, or of any other persons, of the reversion of the same land and hereditaments so letten, or any parcel thereof, for any condition, covenant, or agreement, expressed in the indentures of their leases, as the same lessees might have had against the said lessors and grantors, their heirs and successors.

The assignee intended by this statute, is one who comes in by the act and limitation of the party, and not by the mere act of law, as the lord by escheat, the lord who claims for mortmain, &c. (*a*) The surrenderee of a copyhold reversion is within the equity of the statute. (*b*) And where tenant for life, remainder to A. for life, makes a lease under a power, A. is an assignee of the reversion within the statute. (*c*) The assignee of part of the reversion in all the land, is an assignee within the statute. (*d*) And so the assignee of the reversion in part of the land. (*e*) But the assignee of a rent-charge is not within the statute, for a covenant cannot run with a rent, nor is there any reversion. (*f*) The statute only extends to covenants which run with the land (*g*); and it does not extend to reversions upon estates tail, for the word *lessee* is used, and tenant in tail is not a lessee within the meaning of the statute. (*h*) When the reversion to which the covenant is incident is merged, he in whose estate such reversion is merged, cannot sue as assignee within this statute. (*i*)

(*a*) Co. Litt. 215, b. The assignee of the reversion by bargain and sale, who is in partly by act of law, is within the statute. *Ib.* 4 Leon. 29. Shep. Touch. 222.

(*b*) Glover v. Cope, 1 Show. 284. 3 Lev. 326. Carth. 205, S. C.

(*c*) Isherwood v. Oldknow, 3 M. and S. 383.

(*d*) Co. Litt. 215, a. Attoe v. Hemmings, 2 Bulstr. 281. Shep. Touchs. 152.

(*e*) Twynam v. Pickard, 2 Barn. and Ald. 105.

(*f*) Milne v. Branch, 5 M. and S. 411.

(*g*) Spencer's case, 5 Rep. 17. Co. Litt. 215, b. Webb v. Russell, 3 T. R. 393.

(*h*) Co. Litt. 215, a.

(*i*) Moor, 94. Webb v. Russell, 3 T. R. 402.

Against whom.

Lessee after assignment, bankruptcy, or insolvency.

Bankruptcy.

Where a lessee has entered into an express covenant, he will remain liable on such covenant, notwithstanding an assignment and an acceptance of the assignee by the lessor, and such liability extends also to the executors or administrators of the lessee. (*a*) Formerly bankruptcy was no bar to an action upon such a covenant for rent accrued after the bankruptcy (*b*); but now by statute, 49 Geo. 3, c. 121, s. 19, it is enacted, that in all cases in which a commission of bankrupt shall be sued forth against any person after the passing of this act, and such person shall be entitled to any lease, or agreement for a lease, and the assignees shall accept the same, and the benefit therefrom, as part of the bankrupt's estate and effects, the bankrupt shall not be, or be deemed to be liable to pay the rent accruing due after such acceptance of the same as aforesaid, and after such acceptance the bankrupt shall not be liable to be in any manner sued, in respect or by reason of any subsequent non-observation, or non-performance of the conditions, covenants, or agreements, therein contained, a proviso follows, enabling the lessor to apply to the Lord Chancellor for relief, in case the assignees refuse, either to accept the lease or to give up the premises.

By this statute, the lessee, on the acceptance by his assignees, is absolutely discharged from his covenants, and therefore should he again come in as assignee of his assignees, he must be charged, as assignee and not as lessee. (*c*) This statute does not extend to cases between the lessee and assignee of the lease. (*d*)

If the assignees intermeddle with, and assume the management of the land, it will be evidence of their having accepted the lease. (*e*) Thus when the assignees were chosen on the 8th of July, and suffered the bankrupt's cows to remain on the premises till the 10th; during which time they were twice milked by order of the assignees, whose servant had received the key of the premises from the messenger under the commission, Lord Ellenborough held these circumstances to be a sufficient adoption of the demise. (*f*) So where the assignees enter upon, and take posses-

(*a*) Brett v. Camberland, Cro. Jac. 521. Auriol v. Mills, 4 T. R. 98, and see the cases collected in 1 Saund. 240, a, note 5, 5th edit. The action lies against the lessee or assignee at the lessor's election. Bachelourev. Gage, W. Jones, 223.

(*b*) Mills v. Auriol, 1 H. Blackst. 443, 445. 4 T. R. 94. 100, S. C. in Error.

(*c*) Doe d. Cheere v. Smith, 5 Taunt. 795. 1 Marsh. 359, S. C.

(*d*) Taylor v. Young, 3 Barn. & Ald. 521.

(*e*) Thomas v. Pemberton, 7 Taunt. 206.

(*f*) Welsh v. Myers, 4 Campb. N.P. C. 368.

sion of the premises, they become chargeable with the covenants, although the bankrupt's effects are upon the premises, and the assignees deliver up the keys immediately after the effects are sold. (*a*) So if the assignees put up a lease to sale, and accept a deposit from a purchaser, they are liable as assignees, unless they shew the contract to be rescinded. (*b*) But the mere fact of putting a lease up to auction, the assignees never having taken actual possession, and there being no bidder, is not an acceptance of the lease. (*c*) And where the assignees allowed the bankrupt's effects to remain on the premises for nearly twelve months, and in order to prevent a distress, paid certain arrears of rent, intimating at the same time to the landlord that they did not intend to take to the lease, unless it could be advantageously disposed of, and the lease was put up to sale by the assignees, but there were no bidders for it, and the assignees omitted for nearly four months to return the key to the landlord, these circumstances were held not to amount to an acceptance. (*d*) So a release of an under tenant by the assignee does not amount to an acceptance of the original lease. (*e*) Until the assignees of a bankrupt do some act to manifest their assent to the assignment of a term to them, and their acceptance of the estate, the term still remains in the bankrupt, and he is liable on the covenant for payment of rent, for arrears accruing subsequently to his bankruptcy. (*f*) *Against whom.*

The lessee will be liable upon his express covenant after his discharge, under an insolvent act, unless there be a special clause therein to relieve him (*g*); as in the late insolvent act of 5 Geo. 4, c. 61, in which (s. 19) it is enacted, That in all cases in which a person shall take the benefit of the said acts, (1 Geo. 4, c. 119; 3 Geo. 4, c. 123) or either of them, and such person shall be entitled to a lease or agreement for a lease, and his assignee or assignees shall accept the same, and the benefit thereupon, as part of the insolvent's estate and effects; the insolvent shall not be, nor be deemed to be liable to pay the rent accruing due after such acceptance of the same as aforesaid; and after such ac- *Insolvency.*

(*a*) Hanson v. Stephenson, 1 Barn. and Ald. 303.

(*b*) Hastings v. Wilson, Holt's N.P. C. 290. See also Page v. Godden, 2 Stark. N.P.C. 309.

(*c*) Turner v. Richardson, 7 East, 336. 1 B and A. 307.

(*d*) Wheeler v. Bramah, 3 Campb. N.P. C. 340. 1 B. and A. 308.

(*e*) Hill v. Dobie, 8 Taunt. 325. 2 B. Moore, 342, S. C.

(*f*) Copeland v. Stephens, 1 Barn. and Ald. 593.

(*g*) Cotterell v. Hooke, Dougl. 97. Marks v. Upton, 7 T. R. 305.

Against whom.

ceptance, the insolvent shall not be liable to be in any manner sued, in respect, or by reason of any subsequent non-observance, or non-performance of the conditions, covenants, or agreements, therein contained; provided that in all such cases as aforesaid, it shall be lawful for the lessor or person agreeing to make such lease, his heirs, executors, administrators, or assigns, if the assignee or assignees shall decline, upon his or their being required so to do, to determine, whether he, or they, will or will not accept such lease or agreement for a lease, to apply to the said court or commissioner, praying, that he or they may either so accept the same, or deliver up the lease or agreement for the lease, and the possession of the premises demised or intended to be demised, and such court or commissioner shall thereupon make such order, as in all the circumstances of the case shall seem meet and just, and such order shall be binding on all parties.

Heir.

When the ancestor has covenanted for himself and his heirs, the heir may be sued upon such covenant, and it is not necessary to allege in the declaration that he has lands by descent, which is matter of defence and must be pleaded. (*a*) And in a covenant running with the land, and binding the assignee, the heir, though not bound as heir, may yet be bound as assignee. (*b*) Where in an action on a breach of a covenant for quiet enjoyment the declaration alleged that the reversion vested in the defendant by assignment, and it appeared in evidence, that the estate descended to the defendant as heir, the court held that the allegation was sufficiently proved. (*c*)

Executors.

Covenant lies against an executor in every case, although he be not named, unless it be such a covenant as is to be performed by the person of the testator, which the executor cannot perform. (*d*)

Where an executor is charged on a breach of a covenant committed in the lifetime of his testator, he must be sued as executor, and the judgment against him must be *de bonis testatoris;* but where the executor is charged on a breach of his testator's covenant committed in his own time, he may either be sued as assignee, in case he has entered upon the premises, and then the

(*a*) Dyke v. Sweeting, Willes, 585. Com. Dig. Cov. (C. 2).

(*b*) Prest. Shep. Touchs. 177.

(*c*) Derisley v. Custance, 4 T. R. 75.

(*d*) Hyde v. Dean and Chapter of Windsor, Cro. Eliz. 553. Prest. Shep. Touch. 177, 178. Com. Dig, Cov. (C).

judgment will be *de bonis propriis*, or he may be sued as executor only, in which case the judgment will be *de bonis testatoris*. (*a*) Against whom.

In what cases the assignee of land is liable to be sued at common law, on a covenant running with the land has already been stated (*b*); and by the statute 32 Hen. 8, c. 34, the lessees and grantees of lands, their executors, administrators, or assigns, shall have the same remedy against *the assignees of the reversion*, on any covenant in their leases running with the land, as the lessees themselves might have had against the lessors. (*c*) A covenant which runs with the land is divisable and attaches upon every parcel of the estate; and the assignee of every such parcel may be sued on the covenant. (*d*) An appointee is not such an assignee as is liable on a covenant binding the assigns, for he is not *in* by the appointor. Thus where an estate was conveyed to a trustee in fee, to the use of such persons as W. should appoint, and W. covenanted in the same conveyance for himself, his heirs, and assigns, to pay a certain fee-farm rent reserved out of the estate to the lord, it was held that the land was not bound in the hands of W.'s appointee by this covenant. (*e*) Assigns.

In order to charge the assignee, it must appear that the whole estate of the assignor has passed to him, and not merely that he holds the lands by virtue of an under-lease (*f*), and the devisee of an equitable estate cannot be charged as assignee. (*g*) Where a termor granted the whole of his term to J. S., it was held that J. S. might maintain an action as assignee of the term (and consequently might be sued as such) although in the deed of assignment the rent was reserved to the assignor, with a power of re-entry in case of non-payment, and although new covenants were introduced into the deed. (*h*) *Assignment must be of the whole estate.*

Where a party takes an assignment of a term by way of mort-

(*a*) Tilney v. Norris, 1 Ld. Raym. 553. Carth. 519. 1 Salk. 309, S. C. Collin v. Thoroughgood, Hob. 188. Buckley v. Pirk, 1 Salk. 317. Wilson v. Wigg, 10 East, 313. 1 Saund. 1 a, notes.

(*b*) *Ante*, p. 436, Com. Dig. Cov. (C. 3.) Shep. Touch. 179.

(*c*) *Ante*, p. 445.

(*d*) Congham v. King, Cro. Car. 221. Coman v. Kemise, Sir W. Jones, 245. Bally v. Wells, Wilmot's cases, 346.

(*e*) Roach v. Wadham, 6 East, 289. See Mr. Sugden's observations on this case, Vend. and Purch. 543, 4, 6th edit.

(*f*) Holford v. Hatch, Dougl. 183. Earl of Derby v. Taylor, 1 East, 502. Brewer v. Bill, 2 Anstr. 419.

(*g*) Mayor of Carlisle v. Blamire, 8 East, 487.

(*h*) Palmer v. Edwards, Dougl. 178. (n). Parmenter v. Webber, 8 Taunt. 593. 2 B. Moore, 686.

Against whom.

No entry necessary.

gage, or otherwise, the whole interest immediately passes to him, and he becomes liable on the covenants running with the land, although he has never occupied or become possessed in fact (*a*); but an executor cannot be charged as assignee until he has entered.

But there must be an assent to charge the assignees of a bankrupt.

The general assignment of a bankrupt's personal estate under his commission does not vest a term of years in the assignees, unless they do some act to manifest their assent to the assignment as it regards them, and their acceptance of the estate. (*b*) It has however been held, that no acceptance is necessary to vest a term in the provisional assignee of an insolvent who takes it by assignment under the statute, 53 G. 3, c. 102, s. 18, and the court observed, that a public officer who became provisional assignee, had no discretion allowed him, and that as he could not refuse the assignment, he must be deemed to have consented to accept the property. (*c*)

May discharge themselves by assigning over.

An assignee may exonerate himself from any further liability on the covenants of a lease assigned to him, by assigning over, for as he is chargeable only in respect of the thing demised, and on the privity of estate subsisting between him and the lessor, he is not, after assignment, liable for a breach of covenant committed after that time (*d*), though he still remains answerable for breaches of covenant committed during the time of his occupation. (*e*) There is no fraud in an assignee of a lease assigning over his interest to whomsoever he pleases, with a view to get rid of the lease, although such person neither takes actual possession nor receives the lease (*f*), and an assignment to a feme covert is sufficient, where the husband has not refused his assent. (*g*) Upon a plea of assignment, before breach, it was held sufficient to shew that an assignment had been executed by the assignee, which had not been delivered to the second assignee, but remained in the hands of the solicitor to the first assignee

(*a*) Williams v. Bosanquet, 1 Brod. and Bing. 238, overruling Eaton v. Jacques, Dougl. 444.

(*b*) Copeland v. Stephens, 1 Barn. and Ald. 593. *Ante*, p. 447.

(*c*) Crofts v. Pick, 1 Bingh. 354.

(*d*) Pitcher v. Tovey, 1 Salk. 81. Chancellor v. Poole, Dougl. 764. Bull. N. P. 159.

(*e*) Pitcher v. Tovey, *ubi sup.* Bac. Ab. Cov. (E. 4.) but see Treackle v. Coke, 1 Vern. 165. Onslow v. Corrie, 2 Madd. 341.

(*f*) Taylor v. Shum, 1 Bos. and Pul. 21. Le Keux v. Nash, 2 Str. 1221. Williams v. Bosanquet, 1 Brod. and Bing. 238.

(*g*) Barnfather v. Jordan, Dougl. 451.

who had a lien upon it. (*a*) The assignees of a bankrupt may relieve themselves from their liability as assignees of a term, in the same manner as other persons. (*b*) *Against whom.*

Upon an assignment the law will presume that the assignee assents to it, until he does some act to shew his dissent, though such renunciation need neither be by record nor by deed. (*c*) After such renunciation the original assignee will remain liable. *Unless the second assignee dissents.*

The action of covenant when brought on a covenant relating to lands, is transitory, or local, accordingly as it is founded on privity of contract or privity of estate. As the statute of 32 Hen. 8, c. 34, transfers the privity of contract, in cases under that statute, the venue is transitory. The action therefore between the following parties is transitory. *Of the declaration, Venue.*

Lessor v. Lessee. (*d*) Lessee v. Lessor. (*e*) Assignee of reversion v. Lessee. (*f*) Lessee v. Assignee of reversion. (*g*) *Transitory.*

Between the following parties it is local.

Lessor v. Assignee of lessee. (*h*) Assignee of lessee v. Lessor. (*i*) Assignee of reversion v. Assignee of lessee. (*k*) Assignee of lessee v. Assignee of reversion. (*l*) And so in all cases where the action is brought by or against the assignee of the land. *Local.*

The rent being made payable in a different county from that in which the lands lie, will not render an action on a covenant for the payment of such rent, brought against an assignee, transitory. (*m*) Where the action is local, and it is brought and tried in a wrong county, the defect is aided after verdict by statute 16 and 17 Car. 2, c. 8. (*n*)

Where the plaintiff sues on a covenant in a deed made with

(*a*) Odell v. Wake, 3 Campb. N. P. C. 394.

(*b*) *Ibid.* Wilkins v. Fry, 1 Meriv. 265.

(*c*) *Per* Holroyd, J. Townson v. Tickell, 3 Barn. and Ald. 39.

(*d*) Bulwer's case, 7 Rep. 2, a. 1 Saund. 241, c, (n.) 5th edit.

(*e*) *Ibid.*

(*f*) Thursby v. Plant, 1 Saund. 237.

(*g*) *Ibid.*

(*h*) Barker v. Damer, Carth. 182. 1 Saund. 241, d. (n.) 5th edit. Stevenson v. Lambard, 2 East, 579.

(*i*) *Ibid.*

(*k*) *Ibid.*

(*l*) *Ibid.*

(*m*) Barker v. Damer, Carth. 182. 3 Mod. 338, S. C.

(*n*) Mayor of London v. Cole, 7 T. R. 588. 1 Saund. 241, d, note, 5th edit.

Of the declaration.

Title of plaintiff.

himself, he need not set out any title in the declaration. (*a*) But where he sues as assignee of the reversion, he must set out the title of the lessor, and deduce his own title from him. (*b*) Thus if a termor make a lease, and assign the reversion, the assignee must set forth in his declaration all the mesne assignments of the term down to himself; for he is privy to them, and therefore he shall not be allowed to plead generally, that the lessee's estate, of and in the demised premises, came to him, or to some other person under whom he claims, by assignment. (*c*) But he need not allege any notice to the defendant of the assignment of the reversion to himself. (*d*)

Of defendant.

With regard to the statement of the defendant's title, a more general form of pleading is allowed, and it may be alleged that the estate and interest in the premises came to the defendant by assignment; for the plaintiff is a stranger to the defendant's title, and therefore cannot set it out particularly. (*e*) Nor is it necessary to state *quo jure*, the defendant became assignee, and therefore, in declaring against an heir, he may be charged as *assignee* generally. (*f*) But it is not sufficient in declaring against an assignee of a term to say that *the tenements* came to the defendant by assignment, but it must be shewn that he is assignee of *the term*. (*g*)

Breach.

The breach assigned must be co-extensive with the import and effect of the covenant. (*h*) And where the matter lies properly in the knowledge of the covenantor, a breach in the words of the covenant is sufficient. Thus, where, on a covenant that the defendant had full power, and lawful authority to demise, the breach assigned was, that the defendant, at the time of making the said indenture, had not full power and lawful authority to demise the premises, according to the form and effect of the indenture; after verdict for the plaintiff, and judgment in the King's Bench, it was objected, on error in the Exchequer Cham-

(*a*) Aleberry v. Walby, 1 Str. 230. Com. Dig. Pleader, (2 V. 2). Gold v. Barnsly, Cart. 30.

(*b*) 1 Saund. 233, a, note, 5th edit.

(*c*) 1 Saund. 112, a, notes, 5th edit. And see Mackay v. Macreth, 2 Chit. Rep. 461.

(*d*) Com. Dig. Pleader, (2 W. 14). *Ante*, p. 443.

(*e*) Cotes v. Wade, 1 Lev. 190. 1 Sid. 298, S. C. Pitt v. Russel, 3 Lev. 19. 1 Saund. 112, a, notes.

(*f*) Derisley v. Custance, 4 T.R. 75.

(*g*) Huckle v. Wye, Carth. 256.

(*h*) Com. Dig. Pleader, (2 V. 2).

ber, that it was not stated in the declaration who had title to the premises at the time of making the indenture; but it was resolved that the assignment of the breach was good; because it had pursued the words of the covenant negative, and that it lay more properly in the notice of the lessor, what estate he himself had in the land, than of the lessee who was a stranger to it; and therefore the defendant ought to have shewn what estate he had in the land at the time of the demise, whereby it might appear to the court that he had full power and authority to demise. (*a*) And where the declaration stated that plaintiff by indenture let to defendant's testator a house for years, and the lessee covenanted to repair it well from time to time, during the term, and at the end of the term, to leave the same well repaired; and the breach assigned was, that the lessee did not leave it well repaired at the end of the term, an exception was taken, because the declaration did not shew in what point the house was not well repaired, but it was overruled, for the breach being according to the covenant, it was sufficient; but if the defendant had pleaded that at the end of the term he delivered it up well repaired, then if the plaintiff will assign any breach, he ought particularly to shew in what point it was not well repaired, so as the defendant might give a particular answer thereto. (*b*) So where in covenant the declaration stated that the defendant by indenture demised to the plaintiff a messuage and certain land in C. for sixty years, and covenanted that he was then lawfully seised in fee of an indefeasible estate, and assigned a breach, that at the time of making the indenture he was not lawfully seised in fee, and the defendant pleaded *non est factum;* after verdict for the plaintiff, it was moved in arrest of judgment, that the declaration was not good, because the breach was too general, not shewing that any other was seised, but the objection was disallowed, because as the covenant is general, so the breach may be assigned generally, especially after the plea of *non est factum*, which admits the breach, if it had been his deed. (*c*)

Of the declaration.

As a covenant for quiet enjoyment does not extend to the tortious acts of a stranger (*d*), it is essentially necessary, where the

(*a*) Bradshaw's case, 9 Rep. 60, b. Cro. Jac. 304, S. C. Bridgstock v. Stanion, 1 Ld. Raym, 106. Com. Dig. Pleader, (C. 49).

(*b*) Hancock v. Field, Cro. Jac. 170. Com. Dig. Pleader, (C. 45).

(*c*) Muscot v. Ballet, Cro. Jac. 369. 2 Saund. 181, b, notes, 5th edit. Glinster v. Audley, T. Raym. 14.

(*d*) *Ante*, p. 424.

Of the declaration.

plaintiff has been disturbed by a stranger, to shew in the declaration that such act of disturbance was not tortious. Therefore, where the breach was, that one H. E. entered upon the plaintiff, and ejected him, upon demurrer, the court held that the entry of H. E. must be taken to have been by wrong, as no title was laid in him. (*a*) It must also appear that the title of the party entering, is not derived from the plaintiff himself, and an averment of lawful title without this qualification is bad, even after verdict. Thus where the breach was, that one S. after the commencement of the term, and during the term, having lawful right and title to the premises, entered and ejected the plaintiff; after verdict, it was moved in arrest of judgment, that the breach was not well assigned, because it should be intended that S. had a right to the premises by a *puisne* title, to which the covenant did not extend, and the court held that the breach was not well assigned. (*b*) So where the breach was, that one Y. entered, having lawful title to the premises, and it was objected on special demurrer, that it did not appear that Y.'s title commenced by any act of the defendant's or prior to the conveyance to the plaintiff, who might therefore have been evicted in consequence of some act done by himself, judgment was given for the defendant. (*c*)

But where from the special circumstances of the case it can be gathered that the person evicting had a lawful title not derived from the plaintiff, it is sufficient after verdict, though there be no express allegation of that fact. Thus where A. being possessed of certain premises for a term of years, assigned part of them over to B. for the residue of his term, with a covenant for quiet enjoyment; and B. afterwards assigned them over to C.; it was held that as the declaration set out the indenture from A. to B., in which it was recited, that J. S. (the person evicting) by indenture, demised to A. the premises, the court would, particularly after verdict, (in the absence of any allegation of title in J. S.) presume such title. (*d*) And so, although where it is stated that the party evicting entered by lawful title upon the plaintiff, the court will intend that such title was derived from the plaintiff

(*a*) Tisdale v. Sir W. Essex, Hob. 34. Com. Dig. Pleader, (C. 49).

(*b*) Wotton v. Hele, 2 Saund. 177. Kirby v. Hanaaker, Cro. Jac. 315. Jenk. Cent. 340, S. C. Mosse v. Archer, 3 Mod. 135. Norman v. Foster, 1 Mod. 101.

(*c*) Noble v. King, 1 H. Black. 34.

(*d*) Campbell v. Lewis, 3 Barn. and Ald. 392.

himself; yet it is sufficient if it be stated that the title of the party evicting accrued to him, *before or at the date of the conveyance to the plaintiff*, or it may be stated that his title was *under the defendant*. (*a*) Of the declaration.

Although it is necessary to state that the person evicting had a lawful title not derived from the plaintiff; yet the particulars of such title need not be set out, because they are not in the knowledge of the plaintiff. (*b*) Nor is it necessary to state that the plaintiff was evicted by legal process. (*c*)

Where the covenant for quiet enjoyment is against the acts of a particular person, it is not necessary to shew that the disturbance was under a lawful title (*d*), and so where the disturbance proceeds from the covenantor or his representatives, where he has covenanted against the acts of himself, or his representatives (*e*); but some particular act of disturbance must be shewn. (*f*) If the lessor covenants for quiet enjoyment, against the *lawful* let, suit, &c. of himself, the declaration need not expressly allege that he entered claiming title; it is sufficient if the breach states such a disturbance as clearly appears to be an assertion of right. (*g*)

Paying money into court.

In covenant for a sum certain, as for rent, the defendant may bring the money into court; and where the plaintiff declared for non-payment of rent, and also for not repairing, the court permitted the defendant to pay in what was due for rent, and ordered that on payment of such sum, the proceedings as to that should be stayed. (*h*)

Of the plea.

Accord and satisfaction.

Accord and satisfaction *after* the covenant broken, is a good plea in this action, where no certain duty accrues by the deed, but where a wrong or subsequent default, together with the deed,

(*a*) Norman v. Foster, 1 Mod. 101. Buckly v. Williams, 3 Lev. 385. Foster v. Pierson, 4 T. R. 617. Proctor v. Newton, 2 Lev. 37. Hodgson v. East India Company, 3 T. R. 278. 2 Saund. 181, a, notes, 5th edit.

(*b*) Proctor v. Newton, 2 Lev. 37. Skinner v. Kilbys, 1 Shower, 70. Foster v. Pierson, 4 T. R. 617. Hodgson v. East India Company, 3 T. R. 278.

(*c*) Admitted in Foster v. Pierson, 4 T. R. 617, 621.

(*d*) *Ante*, p. 424.

(*e*) *Ante*, p. 425.

(*f*) Anon. Com. Rep. 229. Francis's case, 8 Rep. 91, a, b. 2 Saund. 181, a, notes, 5th edit.

(*g*) Lloyd v. Tomkies, 1 T. R. 671.

(*h*) Gregg's case, 2 Salk. 596. Anon. 1 Wils. 75. Tidd's P. 671, 8th edit.

Of the plea.

gives the action. (*a*) Where a duty accrues by the deed, and is ascertained at the time of making the writing, as by covenant, bill, or bond, to pay a sum of money, in that case the duty, which is certain, takes its essence and operation originally and solely by the writing, and therefore, it must be avoided by matter of as high a nature, although the duty be merely in the personalty. (*b*) Accord and satisfaction, without deed, is consequently in such an action a bad plea. (*c*) The plea must state a full satisfaction; therefore, in covenant for not repairing, a plea that the plaintiff agreed that the defendant should employ a person four days, in and about repairing the house, in satisfaction, and that he had employed the person, &c. is bad, for the defendant was obliged to do the repairs by the original covenant. (*d*) The satisfaction must also be certain, and therefore, when in covenant for not repairing, the plea stated an accord, that the defendant should (without mentioning within what time) give up the possession of the house to the plaintiff, in satisfaction, and shewed that he gave up possession within five days after the accord; it was held ill upon demurrer, for shewing a performance in certain, does not aid the first uncertainty of the accord. (*e*)

The plaintiff (the tenant of a farm) covenanted with the defendant (the landlord) to fetch and bring all timber, stone, and other materials, which should at any time during the continuance of the term be wanted about the erecting of a threshing mill, and the defendant covenanted to build and erect the same. To an action on the latter covenant, the defendant pleaded, 1st. That he began to provide the necessary materials for erecting the mill, and that whilst he was so doing, the plaintiff desired him not to do the same, but to refrain from so doing until he should be requested by the plaintiff, and 2nd, a plea of licence. On demurrer these pleas were held to be bad. (*f*)

Assignment.

Assignment before breach is a good plea to an action of covenant against an assignee, although the plaintiff has not accepted the second assignee as his tenant, and although no notice of the

(*a*) Lutw. 359, Kaye v. Waghorne, 1 Taunt. 428. Com. Dig. Accord, (A. 2.) Sanford v. Cutliffe, Yelv. 124.

(*b*) Blake's case, 6 Rep. 44, a. Cro. Jac. 99, S.C. Com. Dig. Accord, (A. 2).

(*c*) Rogers v. Payne, 2 Wils. 376, more fully reported, S. N. P. 493, 4th edit.

(*d*) Adams v. Tapling. 4 Mod. 88. and see Fitch v. Sutton, 5 East, 230.

(*e*) Samford v. Cutliffe, Yelv. 124. Com. Dig. Accord, (B. 3).

(*f*) Cordwent v. Hunt, 2 B. Moore, 660.

Of the plea.

assignment has been given to him (*a*); but where a breach has incurred in the time of the assignee, a subsequent assignment by him will not discharge it. (*b*) The lessee himself when charged upon an express covenant cannot plead an assignment before breach (*c*), nor can he plead an assignment before breach, and a tender by the assignee (*d*); but if the lessee has become bankrupt, an acceptance of the lease by his assignees under the statute 49 Geo. 3, c. 121, s. 19, will discharge him from his covenants. (*e*)

Expulsion and eviction.

In covenant for non-payment of rent, the lessee may plead an expulsion by the plaintiff (*f*), for if the plaintiff have expelled the defendant from the demised premises, and kept him out of possession until after the rent became due, it creates a suspension of the rent (*g*), and an illegal expulsion from part of the premises, is a suspension of the whole rent. (*h*) A trespass by the lessor will not be sufficient to support a plea of expulsion. (*i*)

Though an illegal expulsion from part of the land be a suspension of the whole rent, yet if the lessor enter upon part of the land for a forfeiture, or recover a portion in an action of waste, the rent is only apportioned. (*k*) Where the lessee re-demises a part of the premises to the lessor, *reserving a rent*, there is no apportionment, for the parties by the reservation have ascertained what rent shall be allowed for that part, but where there is no rent reserved on the re-demise, there shall be an apportionment, though if part is assigned by the lessee to a stranger, who assigns it to the lessor, and the lessee has reserved no rent, in such case there shall be no apportionment, for the lessor comes under the benefit of the stranger's contract. (*l*) In an action of covenant against the *lessee* himself, the rent cannot be apportioned, for he is charged on his personal contract, and a contract

(*a*) Pitcher v. Tovey, 1 Salk. 81. Taylor v. Shum, 1 Bos. and Pul. 21. *Ante*, p. 450.

(*b*) Pitcher v. Tovey, 1 Salk, 81. *Ante*, p. 450.

(*c*) *Ante*, p. 446.

(*d*) Orgill v. Kermshead, 4 Taunt. 642.

(*e*) *Ante*, p. 446.

(*f*) Dalston v. Reeve, 1 Ld. Raym. 77. Co. Litt. 148, b. Dorrel v. Andrews, Hob. 190. Timbrell v. Bullock, Sty. 446. Reynolds v. Buckle, Hob. 326. Hodgkin v. Queenborough, Willes, 129. 1 Saund. 204, (note) 5th edit.

(*g*) *Ibid.*

(*h*) Co. Litt. 148, b. Hodgkins v. Robson, 1 Vent. 277. Walker's case, 3 Rep. 22, b. Gilb. on rents, 178.

(*i*) Hodgkin v. Queenborough, Willes, 131. Roper v. Lloyd, T. Jones, 148. Hunt v. Cope, Cowp. 242.

(*k*) Co. Litt. 148, b. Walker's case, 3 Rep. 22, b. 1 Rol. Ab. 235, l. 23.

(*l*) *Per* Hale, C. J. Hodgkins v. Robson, 1 Ventr. 277. Gilb. on rents, 180, 181, but see Co. Litt. 148, b. 4 Rep. 52, b. 9 Rep. 135, a.

Of the plea.

is not divisible, but in an action against the assignee of the lessee the rent may be apportioned, for he is charged in respect of the land, and on privity of estate, and not on personal contract. (*a*)

If lands demised are evicted from the tenant, *i.e.* recovered by a title paramount, the lessee is discharged from the payment of rent from the time of such eviction (*b*), and if part only of the land demised, has been evicted from the tenant, such eviction is a discharge of the rent in proportion to the value of the land evicted (*c*), but the tenant remains liable for the rent which became due before the eviction. (*d*)

Eviction is a good plea to an action on a covenant to leave the premises in repair at the end of the term (*e*), but to an action of covenant for not repairing several premises, an expulsion by the plaintiff from part is not a good plea. (*f*)

Infancy.

Infancy is a good defence in an action of covenant, but it must be specially pleaded. (*g*)

Levied by distress.

In covenant for non-payment of rent, the defendant cannot plead that the rent has been levied by distress (*h*), because it amounts to a confession, that the rent was not paid at the day appointed, and therefore shews a breach of the covenant.

Non infregit conventionem.

Non infregit conventionem does not appear to be in any case a good plea at common law, to an action for breach of covenant (*i*), but it is aided after verdict. (*k*)

Nil habuit in tenementis.

By force of the rule, that a tenant shall not be allowed to dispute his landlord's title, the defendant cannot plead *nil habuit*

(*a*) Stevenson v. Lambard, 2 East, 575.

(*b*) Gilb. on rents, 146.

(*c*) Clun's case, 10 Rep. 128, a. Dyer, 56, a.

(*d*) Baynton v. Bobbett, 2 Vent. 68. Gilb. on rents, 146; as to setting out the title of party evicting, see Jerdan v. Twells, cases *temp.* Hardw. 172, *s. v. Ante*, p. 455.

(*e*) Andrews v. Needham, Cro. Eliz. 656.

(*f*) Hodgkin v. Queenborough, Willes, 129. Bull. N. P. 165.

(*g*) Bull. N. P. 172.

(*h*) Hare v. Savil, 2 Brownl. 273. So *riens in arrear* is said to be a bad plea, Hare v. Savill, 1 Brownl. 19. Adm. Warner v. Theobald, Cowp. 589, arg.; but see Com. Dig. Pleader, (2. V. 14,) 2 Brownl. 273. Bull. N. P. 166, *contra.*

(*i*) Hodgson v. East India Company, 3 T. R. 278. Pitt v. Russel, 3 Lev. 19. Taylor v. Needham, 2 Taunt. 278.

(*k*) Walsingham v. Comb, 1 Lev. 186. Com. Dig. Pleader, (2 V. 5).

Of the plea.

in tenementis (*a*), to an action of covenant. If such a plea be pleaded, the plaintiff, as the lease is stated to be by indenture, may demur. (*b*) Thus where the declaration stated, that J. P. was seised in fee on a certain day, and on the same day demised by indenture to the defendant, and afterwards assigned the reversion to the plaintiff, and the defendant pleaded that before the demise and assignment of the reversion to the plaintiff, J. P. conveyed the premises to J. S. in fee, and traversed, that at any time after that conveyance J. P. was seised in fee; on general demurrer, it was held, that this was a special *nil habuit in tenementis*, which was no more to be allowed where the demise was by indenture, than a general plea of that kind; and although the plaintiff was an assignee, yet he might take advantage of the estoppel because it ran with the land. (*c*) So where the lessee pleaded, that the lessor had only an equitable estate in the thing demised, the plea was held bad. (*d*) So a lessee of land in the Bedford Level cannot plead to an action by his landlord, that the lease is void by statute 15 Car. 2, c. 17, for want of being registered. (*e*)

But although the lessee is estopped from denying his landlord's title, yet he is not estopped from shewing that it has expired. (*f*) With regard to leases by indenture, the rule is this: where some *interest* passes by the demise, though it be not so great as the lease assumes to pass, the estoppel is commensurate with the interest (*g*); but where the lessor has *nothing* in the lands at the time of the lease, and therefore no interest passes out of him to the lessee, but the title begins by the estoppel, which the deed creates between the parties, such estoppel runs with the land into whose hands soever it comes, whether heir or assignee. (*h*) Thus the lessee is not estopped from shewing, that the lessor was only seised in right of his wife, for her life, and that she died before the covenant was broken (*i*); but if a man makes

(*a*) Parker v. Manning, 7 T. R. 537. Bayler v. Needham, 2 Taunt. 278.

(*b*) Kemp v. Goodall, 1 Salk. 277. Co. Litt. 47, b. Palmer v. Ekins, 2 Str. 818.

(*c*) Palmer v. Ekins, 2 Str. 818. 11 Mod. 407. 2 Ld. Raym. 1550, S. C.

(*d*) Blake v. Forster, 8 T. R. 487.

(*e*) Hodson v. Sharpe, 10 East, 350.

(*f*) England v. Slade, 4 T. R. 682. Doe d. Jackson v. Ramsbotham, 3 M. and S. 516. Doe d. Lowden v. Watson, 2 Stark. 230.

(*g*) Treport's case, 6 Rep. 15, a. Brudnell v. Roberts, 2 Wils. 143. Blake v. Foster, 8 T. R. 487. 2 Saund. 418, note, 5th edit.

(*h*) 2 Saund. 218, a, note.

(*i*) Blake v. Foster, 8 T. R. 487.

Of the plea.

a lease of D., by deed, in which he has *nothing*, and afterwards purchases D. in fee, and suffers it to descend to his heir, or conveys it away in fee, the heir or assignee shall be bound by this estoppel, and so shall the lessee and his assignees. (*a*)

Non demisit.

As the lessee cannot plead *nil habuit in tenementis* to an action of covenant on a demise; neither can he or his assignee plead *non demisit*. (*b*)

Non est factum.

There is no general issue in covenant, for the plea of *non est factum* only puts in issue the due execution of the deed as stated, and its existence as a deed at the time of pleading.

A variance may be taken advantage of under the plea of *non est factum*, for the deed proved is not the same deed as that stated in the declaration. Therefore, where a covenant is stated absolutely, without the qualifying context which belongs to it, this being an untrue statement of the deed in point of substance and effect, will be ground of nonsuit. (*c*) Thus where the declaration stated a covenant to repair generally, and *non est factum* was pleaded, and it appeared, that the covenant contained an exception of "fire and all other casualties," Lord Ellenborough held, that the defendant was entitled to take advantage of this variance, on *non est factum*. (*d*) But when the deed contains a proviso in defeasance of the covenant, but not incorporated therewith, it is no variance to omit such proviso. (*e*) And where a lease was stated in the declaration to be made by the plaintiff of the one part, and T. R. of the other part, but appeared in evidence to have been made by the plaintiff and his wife on the one part, and T. R. on the other; this was held to be no variance. (*f*)

Erasure, or addition to, or alteration of the deed in any material part, may be given in evidence under *non est factum*. (*g*)

(*a*) Trevivan v. Lawrence, 1 Salk. 276. 6 Mod. 258. 1 Ld. Raym. 789, S. C. Palmer v. Ekins, 2 Ld. Raym. 1550. Co. Litt. 47, b. 2 Saund. 418, a, note.

(*b*) Taylor v. Needham, 2 Taunt. 278.

(*c*) Howell v. Richards, 11 East, 641.

(*d*) Tempany v. Burnand, 4 Campb. N. P. C. 20. See Swallow v. Beaumont, 2 Barn. and Ald. 765. Pitt v. Green, 9 East, 188.

(*e*) Gordon v. Gordon, 1 Stark. N. P. C. 294.

(*f*) Arnold v. Revoult, 1 Brod. and Bing. 443. Friend v. Eastabrook, 2 Wm. Bl. 1152.

(*g*) Whelpdale's case, 5 Rep. 119, b. Pigot's case, 11 Rep. 27, a. Bull. N. P. 171.

Of the plea.

So coverture of the defendant at the time of execution, may be given in evidence under this plea (*a*); but not infancy (*b*), or duress. (*c*)

Performance.

The defendant may plead performance generally, or specially. (*d*) If the covenants be all in the affirmative, the defendant may plead a general performance; but if any be in the negative, to those he must plead specially, (for a negative cannot be performed,) unless the negative covenants are all void and contrary to law. (*e*) And if any of the covenants be in the disjunctive, the plea must be special. So if they be to do any act of record. (*f*) And so if the covenant be partly affirmative and partly negative. (*g*)

Release.

The defendant may plead a release of all *covenants*, which is a good discharge, both before and after breach (*h*); but a release of all *actions, suits, and quarrels*, before the covenant broken, does not discharge a covenant to build a house, &c. because at the time of the release there was not any duty or cause of action in being. (*i*) So in covenant for non-payment of rent, a release of *all demands* at a day before the rent in question became due is bad. (*k*) If a covenant be made with B. his executors, and assigns, in an action by an assignee, the defendant cannot plead a release by B. after an action brought by the assignee, for then an interest in the covenant is vested in the latter. (*l*)

Set-off.

There is no general issue in this action, and a set-off must therefore be *pleaded*, for no notice of set-off can be given. (*m*) A set-off cannot be pleaded in covenant, either where the plain-

(*a*) Whelpdale's case, 5 Rep. 119, a. Bull. N. P. 172.

(*b*) *Ibid.*

(*c*) *Ibid.*

(*d*) Com. Dig. Pleader, (2 V. 13).

(*e*) Co. Litt. 303, b. Norton v. Simmes, Hob. 13. Moor, 856. Com. Dig. Pleader, (E. 26), (2 V. 13).

(*f*) Co. Litt. 303, b. Com. Dig. Pleader, (E. 25).

(*g*) Laughwell v. Palmer, 1 Sid. 87.

(*h*) Co. Litt. 292, b. Dyer, 57, a. Com. Dig. Release, (E. 4).

(*i*) Co. Litt. 292, b. Com. Dig. Pleader, (2 V. 11).

(*k*) Henn v. Hanson, 1 Lev. 99. Hancock v. Field, Cro. Jac. 170.

(*l*) Middlemore v. Goodale, Cro. Car. 503. 2 Rol. Ab. 411, l. 30. Com. Dig. Pleader, (2 V. 11). And see Harper v. Burgh, 2 Lev. 206. Com. Dig. Release, (E. 4).

(*m*) Oldenshaw v. Thompson, 5 M. and S. 164.

Of the plea.

tiff proceeds for unliquidated damages (*a*), or where unliquidated damages are the subject of the set-off. (*b*)

Tender.

In an action upon a covenant for payment of rent, the defendant may plead a tender before action brought. (*c*)

Traverse of title.

If the plaintiff claims as assignee of the reversion, and the defendant has not recognised his title by any act, as by payment of rent, he may traverse the plaintiff's derivative title (*d*), and so, although the defendant cannot plead *nil habuit in tenementis* or *non demisit* (*e*), yet, if an interest originally passed by the lease, he may plead that the lessor's title has expired (*f*), unless he has done some act to recognise the title since such expiration. So also if the defendant is sued as assignee, he may deny that the term came to him by assignment *modo et formâ*. (*g*)

Traverse of breach.

The defendant may deny the breach as alleged by the plaintiff; thus where the breach assigned is, that the defendant has not used the demised premises in a husband-like manner, but on the contrary thereof has committed waste, the defendant may plead that he has not committed waste, but has used the farm in a husband-like manner. (*h*)

Of the evidence.

As there is no general issue in this action, the whole declaration can never be put in issue, and the evidence will depend upon the nature of the issue joined in each particular case. It will be sufficient to state the evidence requisite to support those issues which more frequently arise in this action.

Assignment.

In an action against an assignee of a term, if he pleads an assignment before breach (*i*) which is traversed, he must prove the assignment as stated in his plea, but it is not necessary to prove that the assignment has been actually delivered to the assignee (*k*), or that the assignee has taken possession. (*l*)

(*a*) Grant v. Royal Exchange Assurance Company, 5 M. and S. 439.

(*b*) Weigall v. Waters, 6 T. R. 488.

(*c*) Johnson v. Clay, 7 Taunt. 486. 1 B. Moore, 200, S. C. Tender and *non est factum*, held to be inconsistent pleas, Orgill v. Kemshead, 4 Taunt. 459.

(*d*) *Ante*, p. 452, and see Carvick v. Blagrave, 1 Brod. and Bing. 531.

(*e*) *Ante*, p. 459.

(*f*) *Ante*, p. 459.

(*g*) *Ante*, p. 452.

(*h*) Harris v. Mantle, 3 T. R. 307.

(*i*) *Ante*, p. 456.

(*k*) Odell v. Wake, 3 Campb. N. P. C. 394.

(*l*) *Ante*, p. 450.

Of the evidence.

Expulsion and eviction.

If the defendant pleads an expulsion by the plaintiff, or an eviction by a stranger under a title paramount, and the expulsion or eviction is traversed, he must prove an expulsion or eviction sufficient to discharge the covenant declared upon. Thus if the plaintiff has declared on the covenant for payment of rent, a wrongful expulsion by the plaintiff from part only of the demised premises is a good plea, for it suspends the whole rent (*a*); but a rightful entry by the lessor into part of the premises, as for waste done, &c. only creates an apportionment of the rent, which cannot be pleaded in an action of covenant against the lessee himself, who is sued on the privity of contract, though it is a good answer *pro tanto*, in an action against an assignee. Evidence of a mere trespass will not support a plea of expulsion. It must be proved that the defendant was expelled and kept out until after the rent became due. (*b*)

Non est factum.

Upon the plea of *non est factum*, the plaintiff must prove the execution of the deed (*c*), and under this plea advantage may be taken of any material variance, an erasure, &c. (*d*) If the defendant do not plead *non est factum*, the execution of so much of the deed as is set out on the record is admitted, but if the plaintiff wishes to avail himself of any other part of the deed, he must prove it by the attesting witness in the common way. (*e*) The defendant cannot give evidence of a set-off in covenant, unless it be especially pleaded, for a notice of set-off cannot be given with the plea of *non est factum* in this action. (*f*)

Release.

Under the plea of release, which must be shewn to be by deed, the defendant must prove that the release was executed subsequently to the breach of the covenant, in case it is a release of all *demands*, or of all *damages*, &c. but if it is a release of all *covenants*, it is good though executed before breach. (*g*)

Traverse of title of plaintiff.

Where the plaintiff's derivative title is traversed, he must prove it as alleged. Thus, if he be assignee of the reversion he must prove the due execution of the assignment; if he be assignee of the estate of a bankrupt lessor, he must prove his title as such, and so if he claims as heir, or executor, he must prove

(*a*) *Ante*, p. 457.
(*b*) *Ante*, p. 458.
(*c*) As to proving the execution, see 1 Phill. Evid. 446. (6th edit.)
(*d*) *Ante*, p. 460.
(*e*) Williams v. Sills, 2 Campb. N. P. C. 519.
(*f*) Oldenshaw v. Thompson, 5 M. and S. 164. *Ante*, p. 461.
(*g*) *Ante*, p. 461.

Of the evidence.

his title according to the circumstances of the case. But if the lessee has acknowledged the title of the plaintiff, as by payment of rent, he will not be allowed to dispute it afterwards, and it will be sufficient for the plaintiff to give evidence of such acknowledgment. (*a*)

Traverse of title of defendant.

In an action against an assignee, if the plaintiff derive his right of action against him, through a variety of deeds, instead of alleging generally that the term vested in him by assignment, he must prove the deeds as stated, if traversed by the defendant (*b*); but where to the general allegation the defendant pleads, that the term did not vest in him by assignment, it will be *primâ facie* sufficient for the plaintiff to shew that the defendant is in possession of the premises, or has paid rent (*c*); but in answer to this, the defendant may prove that he is in by an under-lease, and not by an assignment, and if he is charged as assignee of all the estate in certain premises, &c. he may shew that he is assignee of the estate, &c. in part of the premises only, and this is a fatal variance. (*d*)

If the defendants are assignees of a bankrupt lessee, some proof of the acceptance of the lease by them must be given, if that fact is put in issue. (*e*)

Traverse of the breach.

If the breach is traversed, it must be proved, as laid in the declaration, and the evidence must be confined to the point put in issue. Thus where the breach assigned was, that the defendant had not used the farm in a husband-like manner, but on the contrary thereof had committed waste, and the defendant pleaded that he had not committed waste, but had used the farm in a husband-like manner; the plaintiff was not allowed to give in evidence any unhusband-like treatment of the farm, not amounting to waste, for to that the breach was narrowed. (*f*)

Where in an action on a covenant not to assign or underlet (*g*), issue is taken on the fact of the underletting, it seems to be sufficient *primâ facie* evidence, for the plaintiff to prove that a stranger is in possession of the premises, and that on inquiry such stranger said he rented the house, and that this is sufficient to entitle the plaintiff to call upon the defendant to shew in what

(*a*) Peake's Evid. 267.
(*b*) Turner v. Eyles, 3 Bos. and Pul. 461.
(*c*) 2 Phill. Evid. 125, 6th edit. 2 Stark. Evid. 437.
(*d*) Hare v. Cator, Cowp. 766.
(*e*) See *ante*, p. 450.
(*f*) Harris v. Mantle, 3 T. R. 307.
(*g*) *Ante*, p. 434.

Of the evidence.

other character the stranger occupied the premises. (*a*) But where the covenant was "not to assign, set over, or otherwise let," and in order to prove a breach, evidence was given that a stranger was in possession of the premises, and that he said he had taken the premises from another stranger; Lord Ellenborough held that this was not evidence of a breach, for *non constat*, that the party in possession was not a tortious intruder. (*b*)

Where the plaintiff proceeds on a breach of a general covenant for quiet enjoyment, he must allege that the disturbance was by a person having lawful title not derived from himself (*c*); and if this allegation is traversed, he must prove it as laid. But if the covenant is against the acts of the lessor, his executors, administrators, or assigns, and the disturbance proceeds from him or them, or if it is against the acts of a third party by name, or if it is against the acts of all persons generally, rightful or wrongful (*d*), it will only be necessary to prove the disturbance, and not any title. An actual disturbance must be proved (*e*), a mere verbal disturbance, by prohibiting the tenant of the covenantee from paying rent, will not amount to a disturbance.

In an action of covenant at the suit of the lessor against his lessee, for not cultivating the farm according to covenants contained in the lease, a sub-lessee of part of the premises is a competent witness to prove performance of the covenants on the part of the defendant. (*f*) And where the point in issue is whether C. whose title is admitted, both by the plaintiff and the defendant, demised, first to the plaintiff or to a third person, C. is a competent witness to prove that point. (*g*)

(*a*) Doe d. Hindley v. Rickarby, 5 Esp. N. P. C. 4.

(*b*) Doe v. Payne, 1 Stark. N. P. C. 86. Ejectment on clause of re-entry.

(*c*) *Ante*, p. 453.

(*d*) *Ante*, p. 455.

(*e*) *Ante*, p. 424.

(*f*) Wishaw v. Barnes, 1 Campb. N. P. C. 341.

(*g*) Bell v. Harwood, 3 T. R. 308.

Debt for Rent.

On a lease for years, or at will, rendering rent, debt lies for the rent at common law. (*a*) And so on a lease for years, or at will of incorporeal hereditaments (*b*); and though by the lease the reservation was in corn or other collateral thing. (*c*) So debt for rent lies at common law upon a lease for life, after the determination of the estate of freehold (*d*); though not during its continuance (*e*), but now by statute 8 Anne, c. 14, s. 4, it shall be lawful for any person or persons having any rent in arrear, or due upon any lease or demise, for life or lives, to bring an action of debt for such arrears of rent, in the same manner as they might have done in case such rent were due and reserved upon a lease for years. It has been held that this statute only relates to rent due from a tenant, holding by lease or demise under his landlord; and that debt therefore does not lie for the arrears of an annuity or yearly rent, devised payable out of lands to A. during the life of B. (to whom the lands were demised for life, B. paying the same thereout) so long as the estate of freehold continues. (*f*)

By whom.

The lessor may, in some cases, bring debt for rent, although he has not the reversion at the time of action brought. Thus if a man leases for years, and rent becomes due, and a stranger recovers the land against the lessor, yet the latter may maintain debt for the arrears of rent. (*g*) It has been said that where the lessor grants the reversion, the rent in arrear at the time of the grant is lost, and that the grantor cannot recover such arrears by action of debt, because the contract on which that is grounded is by the act of the lessor determined (*h*); but this doctrine does not appear to be correct.

(*a*) Litt. s. 58, 72. Gilb. on rents, 93. Com. Dig. Dett, (A. 5).

(*b*) Co. Litt. 47, a.

(*c*) 1 Rol. Ab. 591, l. 30.

(*d*) 1 Rol. Ab. 596, l. 17. Gilb. on rents, 94.

(*e*) *Ibid.* Ognel's case, 4 Rep. 49, b.

(*f*) Webb v. Jiggs, 4 M. and S. 113, and see Kelly v. Clubbe, 3 Brod. and Bing. 130. 6 B. Moore, 335, S. C.

(*g*) Br. Ab. Dette, 93.

(*h*) Gilb. on debt, 384, but *quære*, for debt lies by an *assignee* of the reversion after a second assignment, for arrears due before (see *post*), and so it lies in many cases where the privity of contract has been determined before action brought. See Vin. Ab. Dett, (H).

By whom.

If a termor for years assigns all his interest in his term, reserving an annual rent, it has been doubted whether an action of debt will lie for each payment, as it becomes due, or whether the assignor must not wait till the term is expired, because where the whole is assigned there is no reversion, and consequently the duty reserved may be thought more properly a sum in gross than a rent; but it seems settled that such sums are recoverable as rent, after each day of payment. (*a*)

Executors.

At common law, where a man made a lease for life, rendering rent, and such rent became in arrear, and the lessor died, it seems, that his executors after the death of tenant for life were entitled to recover the arrears (*b*); and so where there is tenant for life of a rent, and he dies, the rent being in arrear, his executors at common law may have debt for such arrears. (*c*) So also, where a man leases for years and dies, the rent being arrear, the executor is entitled to recover the rent. But at common law, neither the heir, nor the personal representative of a man who was seised of a rent-service, rent-charge, or rent-seck, in fee-simple or fee-tail, could bring an action of debt for the arrearages of such rents, incurred in the lifetime of the owner. But by statute, 32 Hen. 8, c. 37, s. 1, it is enacted, that the executors or administrators of tenants in fee-simple, in fee-tail, and for term of lives, of rent-services, rent-charges, rent-secks, and fee-farms, unto whom any such rent or fee-farm is due, and not paid at the time of their death, may have an action of debt for all such arrearages, against the tenant or tenants that ought to have paid the said rent, or fee-farm, so being behind in the time of their testator, or against the executors or administrators of the said tenants.

And by section 3, if any man shall have in the right of his wife, any estate, in fee-simple, fee-tail, or for term of life, of or in any rents or fee-farms, and the same rents or fee-farms shall be due, behind and unpaid in the said wife's life, then the said husband after the death of his said wife, his executors, or admi-

(*a*) Gilb. on debt, 385. Newcomb v. Harvey, Carth. 161. Loyd v. Langford, 2 Mod. 174. Com. Dig. Dett, (C). So the assignor may enter for a condition broken, Doe d. Freeman v. Bateman, 2 Barn. and Ald. 168, but he cannot distrain —— v. Cooper, 2 Wils. 375. Parmenter v. Webber, 8 Taunt. 593. 2 B. Moore, 659, S. C.

(*b*) Dyer, 375, b. Ognel's case, 4 Rep. 49, b.

(*c*) Co. Litt. 162, a, and Mr. Hargrave's Note. Gilb. on rents, 98.

By whom.

nistrators, shall have an action of debt for the said arrearages, against the tenant of the demesne that ought to have paid the same, his executors, or administrators.

Assignee.

The assignee of the reversion (*a*), or of the reversion in part of the premises (*b*), may, at common law, maintain debt for rent arrear after the assignment of the reversion to himself; for the privity of contract is said to be annexed to the person in respect of the estate, and to follow the estate. (*c*) Therefore the Lord by escheat (*d*), or he who enters for an alienation in *mortmain* (*e*), may have debt for rent arrear. So the assignee in law of the reversion, as the heir or devisee, may bring debt for rent incurred after the death of the lessor (*f*); and debt lies by an assignee of the reversion against an assignee of the term, after assignment of the reversion by the former, for arrears due before assignment. (*g*) The assignee of the reversion may maintain debt for rent against the lessee, without giving him any notice of the assignment, but if the defendant has paid the rent to the original lessor before notice, he may plead that fact and it will be a good bar. (*h*)

Against whom.

Lessee.

A lessee is liable to an action of debt for the rent as long as the term continues, and cannot discharge himself from his liability by assignment, for debt is maintainable by a lessor against a lessee on privity of contract, and such privity remains notwithstanding the assignment (*i*); but debt will not lie by the assignee of the reversion against the lessee, after assignment by the latter, for there is no privity of contract between those parties. (*k*) And so, if the lessor accepts the assignee as his tenant, he cannot

(*a*) Walker's case, 3 Rep. 22, b. Glover v. Cope, 4 Mod. 81. 1 Rol. Ab. 591, l. 45, 1 Saund. 241, d, note, 5th edit.

(*b*) Ardes v. Watkin, Cro. Eliz. 651. Com. Dig. Dett, (C); but the rent must be apportioned by consent or by a jury, Bliss v. Collins, 5 B. and A. 876.

(*c*) Walker's case, 3 Rep. 22, b.

(*d*) *Ibid.*

(*e*) Com. Dig. Dett, (C). *Contra* in covenant, *ante*, p. 445.

(*f*) 1 Rol. Ab. 591, l. 46. Com. Dig. Dett, (C).

(*g*) Skinner, 367. Com. Dig. Dett, (C). Midgleys v. Lovelace, 12 Mod. 45. Carth. 289, S. C.

(*h*) Watts v. Ognell, Cro. Jac. 192. Birch v. Wright, 1 T. R. 385.

(*i*) Rushden's case, Dyer, 4, b. Hellier v. Casbard, 1 Sid. 266. 1 Lev. 127. S.C. 1 Saund. 241, b, notes, 5th edit. And see the observations there on Overton v. Sydhall, Poph. 120, and cited 3 Rep. 24, a.

(*k*) Humble v. Oliver, Poph. 55. 2 Brownl. 56. Cro. Eliz. 328, S. C. Walker v. Harris, Moor, 351. Walker's case, 3 Rep. 23, b. Com. Dig. Dett, (D).

Against whom.

afterwards maintain debt against the lessee, because the privity of contract between himself and the lessee is determined by the assignment and acceptance of the assignee (*a*), but notwithstanding such acceptance, the lessee may still be sued on an express covenant for the payment of the rent. (*b*) If the lessee becomes bankrupt, he cannot be sued, in debt, for rent accruing after the commissioners' assignment; the lessor's assent to such assignment being virtually included in the act of parliament authorising the assignment of the bankrupt's estate. (*c*)

Assignee.

Where the lessee has assigned, the lessor, if he has not accepted the assignee as his tenant, may sue the lessee or assignee at his election. (*d*) And where the lessee has assigned a moiety of the land for the whole term, the assignee has a sufficient privity of estate to be charged by the lessor for a moiety of the rent (*e*), or as it is said, the lessor may have a joint action of debt against the lessee and assignee for the whole rent. (*f*)

If the assignee assigns over, debt will not lie against him for rent accruing after the assignment, although the lessor has not accepted the second assignee, and although no notice has been given of the second assignment. (*g*)

Heir and Executor.

Where the lessee has covenanted for himself and his heirs, to pay the rent, debt may be maintained for rent arrear, in the lessee's lifetime, against either the heir, or executor, if assets have descended. (*h*) The executor of the lessee is liable in debt for the rent, notwithstanding an assignment by the testator or by himself, provided the lessor has not accepted the assignee, for there is a privity of contract between the lessor and his representatives, and the lessee and his representatives, sufficient to maintain this action. (*i*) An executor of a lessee for years may be charged for rent accruing in his own time, either as executor, or if he has entered, as assignee. (*k*)

(*a*) Marrow v. Turpin, Cro. Eliz. 715. Moor, 600, S.C. Wadham v. Marlow, 8 East, 314, n. 1 Saund. 241, b, note, 5th edit. Auriol v. Mills, 4 T. R. 98.

(*b*) *Ante*, p. 446.

(*c*) Wadham v. Marlow, 8 East, 314, n. 1 H. Bl. 437, n. S.C.

(*d*) Devereux v. Barlow, 2 Saund. 181.

(*e*) Gamon v. Vernon, 2 Lev. 231. Sir T. Jones, 104, S.C. Stevenson v. Lambard, 2 East, 581.

(*f*) Bailiffs of Ipswich v. Martin, Cro. Jac. 411. Com. Dig. Dett, (E).

(*g*) Tongue v. Pitcher, 3 Lev. 295. 2 Vent. 234. 4 Mod. 71. 1 Salk. 81. 1 Show. 340. Carth. 177. 12 Mod. 23, S.C. Com. Dig. Dett, (F).

(*h*) Shep. Touch. 178.

(*i*) See the cases cited, *ante*, p. 468, note (*i*), and also *ante*, p. 446, note, (*a*).

(*k*) *Ante*, p. 448; *post*, p. 470.

Of the declaration.

In the *debet and detinet*, or *detinet*.

When the action is brought against the lessee himself, or against his assignee, the defendant is charged in the *debet and detinet*. When it is brought against an executor, and the whole rent accrued in the testator's lifetime, the action must be in the *detinet* only (*a*); and where part of the rent accrues in the testator's time, and part in that of the executor, the plaintiff may recover the whole in one action charging the executor in the *detinet*. (*b*) For rent incurred after the death of the lessee, if the executor enters, he may be charged as assignee in the *debet and detinet* (*c*); in which case he cannot plead *plene administravit* (*d*), and the judgment is *de bonis propriis* (*e*); but if the land be of less value than the rent, the defendant may plead the special matter, viz. that he has no assets, and that the land is of less value than the rent, and pray judgment whether he shall be charged otherwise than in the *debet*. (*f*) But the executor cannot be sued in one action, in the *detinet* for the part incurred in his testator's time, and in the *debet and detinet* for the part incurred in his own time, for then two different judgments would be necessary. (*g*) The plaintiff in such case must either sue the executor in one action, charging him in the *detinet* only, when his judgment will be *de bonis testatoris*, or he must bring two separate actions. If the executor does not enter, he is still chargeable in the *detinet*, for he cannot so waive the term as not to be liable for the rent if he has assets. (*h*)

Venue.

When the action is brought on the privity of contract, the venue is transitory; when it is brought on the privity of estate, local. Therefore where the action is brought by the lessor against the lessee, or against the executor of the lessee, charging him in the *debet* as executor, the venue is transitory (*i*), but where the action is brought by the lessor against the assignee of the lessee,

(*a*) 1 Rol. Ab. 603. (S.) Fruen v. Porter, 1 Sid. 379. 1 Saund. 1, note, 5th edit.

(*b*) Aylmer v. Hide, M. 13 G. 2, B.R. MS. Selw. N. P. 577, 4th edit.

(*c*) Hargrave's case, 5 Rep. 31. 1 Rol. Ab. 603, l. 36. Lord Rich v. Frank, Cro. Jac. 238. Bailiffs, &c. of Ipswich v. Martin, Cro. Jac. 411. Vin. Ab. Debt, (S.) pl. 8.

(*d*) Buckley v. Pirk, 1 Salk. 317.

(*e*) Wentw. Ex. 194. Bailiffs, &c. of Ipswich v. Martin, Cro. Jac. 411.

(*f*) Billinghurst v. Spearman, 1 Salk. 297. Buckley v. Pirk, 1 Salk. 317.

(*g*) Salter v. Cobbold, 3 Lev. 74.

(*h*) Helier v. Casebert, 1 Lev. 127. 1 Sid. 266, S. C. Billinghurst v. Spearman, 1 Salk. 297. Howse v. Webster, Yelv. 103.

(*i*) Patterson v. Scott, 2 Str. 776, 1 Saund. 241, note, 5th edit. King v. Fraser, 6 East, 353.

or against the executor of lessee, charging him as assignee in the *debet and detinet* for rent incurred in his own time, the action is local, and must be brought in the county where the land lies; and so where it is brought by the assignee of the reversion against the lessee or the assignee of the lessee, for in all these cases the action is founded on the privity of estate. (*a*) Where the action is local, and is brought and tried in the wrong county, the defect is aided after verdict by statute 16 & 17, C. 2, c. 8, and therefore if the defendant intends to take advantage of the wrong venue, he should demur. (*b*) And if the parcels are not set out in the declaration, the defendant must crave oyer of the indenture, and set it out before he can demur. (*c*) Of the declaration.

Debt by an executor or administrator of tenant in fee, &c. for rent services, &c. under statute, 32 Hen. 8, c. 37, is local. (*d*)

It is a general rule that whenever an action is founded on a deed, such deed must be declared on, but the case of rent reserved by deed is an exception. (*e*) In debt for rent it is not necessary to state that the demise was by indenture, but it is sufficient to say generally that the lessor demised the premises for a certain term, though by this mode of declaring the defendant will be at liberty to plead *nil habuit in tenementis*, because no estoppel appears upon the record, and the plaintiff in such case will be compelled to reply that the demise was by indenture, whereas, had he stated that fact in his declaration, he might have demurred to the plea of *nil habuit in tenementis*. (*f*) But where the lease is of tithes which lie in grant, and can only pass by deed, the deed should be set out in the declaration. (*g*) Statement of demise.

The demise may be stated according to its legal effect, and therefore where it was alleged that the plaintiff had demised to the defendant three rooms, and it appeared in evidence that the demise was of three rooms, and the use of the furniture, it was

(*a*) Walker's case, 3 Rep. 22. Barker v. Damer, 3 Mod. 338. Carth. 182, S. C. Wey v. Yally, 6 Mod. 194. 2 Salk. 651, S. C. Stevenson v. Lambard, 2 East, 580. 1 Saund. 241, d, note, 5th edit. but *covenant* by assignee of reversion, is transitory, *ante*, p. 451.

(*b*) Mayor of London v. Cole, 7 T. R. 583, 588. Bailiffs of Litchfield v. Slater, Willes, 431.

(*c*) 1 Saund. 246, d, new notes.

(*d*) Bull. N. P. 177.

(*e*) Atty v. Parish, 1 Bos. and Pul. N. R. 109.

(*f*) Warren v. Consett, 2 Ld. Raym. 1503. 1 Saund. 276, a, note, 325, a, note 4, 5th edit. Com. Dig. Pleader, (2 W. 48), *ante*, p. 459; *post*, p. 474.

(*g*) 2 Saund. 297, note 1, 5th edit.

Of the declaration.

held that the declaration was sufficiently proved(*a*), for the rent could not issue out of the chattels.

Locality of the premises.

It was formerly held that the plaintiff must shew in his declaration the local situation of the premises (*b*), but according to the modern practice this does not appear to be necessary. (*c*) Where the plaintiff declared in debt for rent, not setting out the local situation of the lands, and in his particular stated the lands to be in a wrong parish, it was held that he might recover, it not appearing that any misrepresentation was intended, or that the defendant was misled. (*d*)

Rent reserved.

The rent reserved should be shewn, and any material variance will be fatal, as where a rent of 15*l.* and three fowls were reserved, and the declaration omitted to mention the three fowls. (*e*) So the period at which the rent became due should be shewn. (*f*) If the plaintiff declares for part of the rent, he must shew that the rest is satisfied. (*g*)

Title of the plaintiff.

In debt, by the lessor himself, it is unnecessary to state his title or estate (*h*); but where the plaintiff is assignee he must deduce his title by assignment. (*i*) And where the action is brought by a remainderman, for rent reserved by a lease made by tenant for life, under a power, the plaintiff must shew what authority the tenant for life had to make such lease, and that the lease was made according to the power. (*k*) The grantee of a reversion need not allege notice of his title to the tenant, in the declaration, (*l*)

Entry of the lessee, &c.

It is unnecessary to state the entry of the lessee into the lands, unless where the action is brought against tenant at will, who is chargeable merely in respect of his occupation. (*m*)

(*a*) Walsh v. Pemberton, C. B. M. 8 G. 2, MS. Selw. N. P. 583. 4th edit. Spencer's case, 5th Rep. 17, a. Dyer, 312, b.

(*b*) Buckland v. Otley, Cro. Jac. 682. Com. Dig. Pleader, (2 W. 14).

(*c*) Davies v. Edwards, 3 M. and S. 380. 2 Chitty, Pl. 217, but *quære* where the action is local.

(*d*) *Ibid.*

(*e*) Sands v. Ledger, 2 Ld. Raym. 792.

(*f*) Com. Dig. Pleader, (2 W. 14). Gilb. Debt, 407. See Buckley v. Kenyon, 10 East, 142.

(*g*) Baylye v. Offord, (Hughes) Cro. Car. 137. 1 Saund. 201, a, note, 5th edit. Com. Dig. Pleader, (2 W. 14).

(*h*) Scilly v. Dally, 2 Salk. 562. Com. Dig. Pleader, (2 W. 14). *Ante*, p. 452.

(*i*) *Ante*, p. 452.

(*k*) Sands v. Ledger, 2 L. Raym. 792.

(*l*) Watts v. Ognell, Cro. Jac. 193. Birch v. Wright, 1 T. R. 385.

(*m*) Bellasis v. Burbrick, 1 Salk. 209. 1 Ld. Raym. 170, S. C. Williams v. Bosanquet, 1 Brod. and Bing. 238. 1 Saund. 202, a, notes, 5th edit. Vin. Ab. Debt, (c. a.) pl. 6.

Of the plea.

Assignment.

Where the action is brought against the lessee or his personal representative, an assignment without an acceptance of the assignee by the lessor cannot be pleaded (*a*), but if such an acceptance be stated, the plea is good (*b*), and where the action is brought against an assignee, he may plead an assignment before the rent incurred, without stating an acceptance by the lessor. (*c*) If an assignee plead *nil debet* as to twenty pounds, part of the rent, and as to the residue an assignment, he must shew when the twenty pounds became due. (*d*) An assignment before the rent incurred may, it seems, be given in evidence under *nil debet*, in an action against an assignee. (*e*)

Infancy.

In debt for rent the defendant pleaded infancy at the time of the lease made, and upon demurrer the court held the lease voidable only at the election of the infant, by waiving the land before the rent day, but the defendant not having done so, and being of age before the rent day, the plaintiff had judgment. (*f*)

Nil debet.

In debt for rent, whether the demise be stated to be by indenture or not, *nil debet* is a good plea, for the specialty is only inducement to the action (*g*); and this plea puts in issue the whole declaration. (*h*) Under *nil debet* the defendant may give evidence of payment to the plaintiff or to another by his appointment (*i*), or that the plaintiff has agreed that a debt due by him to the defendant, shall go in satisfaction of the rent (*k*), or a release. (*l*) It seems that the defendant cannot under this plea give in evidence, that the plaintiff was bound by covenant to repair the premises, and that he expended the rent in necessary reparations (*m*), but if the lease is by parol, and the lessor di-

(*a*) *Ante*, p. 469.

(*b*) Marsh v. Brace, Cro. Jac. 334. Marrow v. Turpin, Cro. Eliz. 715. Arthur v. Vanderplank, 7 Mod. 198.

(*c*) *Ante*, p. 469.

(*d*) Kighly v. Bulkly, 1 Sid. 338.

(*e*) Skin. 318. Vin. Ab. Evid. (Z. a,) pl. 49.

(*f*) Ketsey's case, Cro. Jac. 320. 2 Bulstr. 69. 1 Rol. Ab. 731, 8, C. Bull. N. P. 177. 2 Burr. 1719.

(*g*) Bull. N. P. 170. Warren v. Consatt, 2 Ld. Raym. 1503. 2 Saund. 297, note, 5th edit.

(*h*) *Per* Holt, C. J. Scilly v. Dally, 2 Salk. 562.

(*i*) Taylor v. Beal, Cro. Eliz. 222. Gallaway v. Susach, 1 Salk. 284. Com. Dig. Pleader, (2 W. 47). Gilb. on Action of Debt, 439; on Evid. 283, 4th edit.

(*k*) Gilb. on Debt, 443; on Evid. 283, 4th edit.

(*l*) *Per* Holt, C. J. Gallaway v. Susach, 1 Salk. 284, 394. Anon. 5 Mod. 18. Paramour v. Johnson, 12 Mod. 377; but see Gilb. Evid. 281, 283, 4th edit. Treatise on Action of Debt, 443.

(*m*) Taylor v. Beal, Cro. Eliz. 222. Bul. N. P. 177; but see Gilb. Evid. 282, 4th edit.; but if pleaded specially, such plea is said to be good. Gilb. on Debt, 442.

Of the plea.

rects the lessee to repair, and the lessee repairs accordingly, the amount so laid out, may be given in evidence under *nil debet*, as evidence of the payment of the rent. (*a*) And where the covenant for payment of rent contains a proviso, that the tenant may deduct a portion of the rent for repairs, it seems that evidence of such deduction may be given under the plea of *nil debet* (*b*), but if the deduction be provided for by a separate covenant it should be specially pleaded. (*c*)

Under this plea the defendant may give in evidence, that the plaintiff expelled him from the premises, and kept him out until after the rent became due, which operates as a suspension of the rent (*d*), and an apportionment of the rent may be given in evidence under *nil debet*. (*e*) An eviction by a third person under a title paramount should, it is said, be specially pleaded. (*f*)

Nil habuit in tenementis.

If the plaintiff has declared, setting out the indenture of demise, the defendant, as it has been already stated (*g*), cannot plead *nil habuit in tenementis*, or if he pleads such plea, the plaintiff may demur. Where the demise is not stated in the declaration to have been by indenture, the defendant may plead *nil habuit in tenementis*, and the plaintiff in such case should reply that the demise is by indenture, and rely upon the estoppel, for if the plaintiff replies that he had a sufficient estate in the premises, he loses the benefit of the estoppel. (*h*) If the demise was without deed, the plaintiff in his replication to the plea of *nil habuit in tenementis* should shew specially what estate he had in the premises. (*i*)

Non demisit.

So *non demisit* is not a good plea where the demise is stated to have been by indenture, though it may be pleaded where the plaintiff declares *quod cum dimisisset*, without stating the indenture. (*k*)

(*a*) Gilb. on Action of Debt, 442.

(*b*) Clayton v. Kinaston, 1 Ld. Raym. 421. Baylye v. Offord, Cro. Car. 137.

(*c*) Johnson v. Carr, 1 Lev. 152. City of Exeter v. Clare, 3 Keb. 331.

(*d*) Anon. 1 Mod. 35. Browne's case, *ibid.* 118. Bull. N. P. 177. Gilb. Evid. 279, 4th edit. 1 Saund. 204, (n) 5th edit. See *ante*, p. 457.

(*e*) Hodgkins v. Robson, 1 Vent. 276. Gilb. on Rents, 189. 2 East, 579.

(*f*) Wingfield v. Seckford, 2 Leon. 10. 2 Phill. Evid. 143, 6th edit.; but see Gilb. on Action of Debt, 429, *contra*.

(*g*) *Ante*, p. 471.

(*h*) Wilkins v. Wingate, 6 T. R. 62. 1 Saund. 276, c. 325, a. notes, 5th edit. *Ante*, p. 471.

(*i*) Gill v. Glasse, Yelv. 227.

(*k*) Bull. N. P. 177. Gilb. on the Action of Debt, 436, 438.

Of the plea.

Non est factum.

It is said, that in debt for rent reserved by deed, *non est factum* may be pleaded (*a*); but this has been denied, because, though the counterpart should not be the deed of the defendant, yet if the plaintiff demised the lands under that rent, and the lessee entered, the rent was a debt, and consequently the traverse of the deed is not a substantive or decisive issue; because, though there were no such counterpart, yet there might have been such a demise as the plaintiff declared upon. (*b*)

Riens in arrear.

Riens in arrear is a good plea in debt for rent, and is tantamount to the plea of *nil debet*, except that it does not put the whole declaration in issue. (*c*) Under this plea, the defendant may give in evidence, that the rent day had not incurred. (*d*)

Where the action is brought by the assignee of the reversion, the defendant may plead payment to the original lessor before notice of the plaintiff's title. (*e*)

Statute of limitations.

Where the demise is by deed, the statute of limitations, (21 Jac. 1. c. 16. s. 3,) cannot be pleaded, although actions of debt for arrearages of rent are expressly within it, for those words are supplied and satisfied by arrearages of rent, upon a demise without deed (*f*), which are within the statute. It has been held, that the statute of limitations may be given in evidence, under the plea of *nil debet* (*g*); but the modern practice is to plead the statute. (*h*)

Tender.

The defendant may plead a tender of the rent at the day, and *always ready*. (*i*) And it seems, that he may say, that he was ready at the day and place to pay it, but that the lessor did not come to receive it, without alleging a tender. (*k*) It is not enough to plead, that the defendant was at, and shortly before sun-set of the rent day, at and upon the premises, and was ready and

(*a*) Gilb. Hist. C. P. 61, 3rd edit. Bull. N. P. 170.

(*b*) Gilb. Debt, 436.

(*c*) Warner v. Theobald, Cowp. 588.

(*d*) *Per* Powell, J. Holt, 567.

(*e*) Watts v. Ognell, Cro. Jac. 192. Birch v. Wright, 1 T. R. 385. *Ante*, p. 468. This seems to be good evidence, under *nil debet*.

(*f*) Freeman v. Stacy, Hutt. 109.

(*g*) Anon. 1 Salk. 278. Draper v. Glassop, 1 Ld. Raym. 153. Com. Dig. Pleader, (2 W. 17).

(*h*) 1 Saund. 283, note.

(*i*) Com. Dig. Pleader, (2 W. 49). Gilb. on Rents, 81.

(*k*) Crouch v. Fastolfe, T. Raym. 418. Gilb. Debt, 441. See 2 B. and B. 194.

Of the plea.

willing, &c., without averring, that there was sufficient time before the setting of the sun to have counted the money. (*a*) On a plea of tender of the rent, the defendant must bring the amount into court (*b*), for the plea is in bar of damages only, and not of the debt; and, therefore, he must answer to the *debet* by bringing the money into court upon the tender. (*c*)

(*a*) Tinckler v. Prentice, 4 Taunt. 549. See Furner v. Prowd, Cro. Jac. 423.

(*b*) Brownlow v. Hewley, 1 Ld. Ray. 82. 1 Lutw. 364, S. C.

(*c*) *Per* Bayley, J. Rowe v. Young, 2 B. and B. 236.

Debt for Use and Occupation.

WHERE the demise is not by deed, it is usual to sue for rent in an action of debt, or assumpsit (*a*), for use and occupation. In this form of action the defendant is merely charged in respect of his occupation; and it is therefore not necessary to set out any demise of the premises, nor for what term they were demised, nor what rent was payable, nor for what length of time the defendant occupied the premises, nor when the sum sought to be recovered became due, nor for what space of time (*b*); and a corporation, which cannot demise, but by deed, may maintain use and occupation, for that action does not suppose a demise. (*c*)

The place, or county, where the premises occupied lie, is immaterial, and therefore need not be mentioned in the declaration, and the inconvenience of this generality may be obviated by calling upon the plaintiff for particulars of his demand. (*d*)

It was doubted in a late case, whether on a judgment by default, in an action of debt for use and occupation, a writ of inquiry was necessary before signing final judgment. (*e*)

(*a*) *Ante*, p. 404.

(*b*) Stroud v. Rogers, Hil. 32 Geo. 3. C. B. the first instance of this form of action being maintained, recognised in Wilkins v. Wingate, 6 T. R. 63.

(*c*) Dean and Chapter of Rochester v. Pierce, 1 Campb. N. P. C. 466.

(*d*) King v. Fraser, 6 East, 350. Egler v. Marsden, 5 Taunt. 25. See further as to setting out the place, *ante*, p. 411.

(*e*) Arden v. Connell, 5 Barn. and Ald. 885.

Debt for Double Value.

By statute 4 Geo. 2, c. 28, s. 1, it is enacted, that in case any tenant or tenants for life, lives, or years, or other persons who shall come into possession of any lands, &c. by, from, or under or by collusion with such tenant or tenants, shall wilfully hold over any lands, &c. after the determination of their term, and after demand made and notice in writing given, for delivering possession thereof, by his or their landlord, or lessor, or the person or persons to whom the remainder or reversion of such lands, &c. shall belong, his or their agents, thereunto lawfully authorised, such persons so holding over, shall, for, and during the time he or they shall so hold over or keep the person or persons entitled out of the possession of the said lands, &c. pay to the person or persons so kept out of possession, their executors, administrators, or assigns, at the rate of double the *yearly value* of the said lands, &c., for so long time as the same are detained, to be recovered by action of debt, whereunto the defendant or defendants shall be obliged to give special bail, against the recovery of which penalty there shall not be any relief in equity. (*a*)

Who is a tenant within the statute.

A tenant for a less term than a year, as tenant from week to week, was held by Lord Ellenborough not within the statute (*b*); and a tenant who holds over under a fair claim of right, will not be considered as wilfully holding over within the statute, though it appear eventually that he had no right. (*c*)

Demand.

The statute requires a *demand* to be made, and a notice in *writing* to be given; but it has been held, that a notice to quit includes a demand. (*d*) Where the tenant holds over, after the determination of a term certain, although no notice to quit is necessary to put an end to the tenancy, yet a demand of the possession must be made, in order to entitle the landlord to double value; such demand, however, need not be made on or

(*a*) This statute was said by the court in Wilkinson v. Colley, 5 Bur. 2698 (recognised in Lake v. Smith, 1 B. & P.N. R. 178), and by Gould, J. in Cutting v. Derby, 2 W. Bl. 1077, to be a remedial law; but Lord Ellenborough, in Lloyd v. Rosebee, 2 Campb. 454, held it to be a penal statute, which was to be construed strictly.

(*b*) Lloyd v. Rosebee, 2 Camp. N. P. C. 453; but see the last note.

(*c*) Wright v. Smith, 5 Esp. N. P. C. 203. See Soulsby v. Neving, 9 East, 312.

(*d*) Wilkinson v. Colley, 5 Burr, 2694.

before the expiration of the tenancy, though the landlord will only be entitled to the double value from the time of demand made. (*a*) If the rent was reserved quarterly, and the demand is made in the middle of a quarter, the landlord cannot recover single rent for the antecedent fraction of such a quarter. (*b*)

Where notice to quit was served upon the tenant, a feme sole, who married before the expiration of the year, it was held, that the landlord might maintain debt against the husband without making a demand of the possession from him, and that in such action it was not necessary to join the wife for conformity. (*c*)

Agent.

An agent is authorised by the statute to give the demand and notice; and it has been held, that a person appointed by the Court of Chancery to receive the rents and profits of the estate, is an agent lawfully authorised within the meaning of the statute. (*d*)

When the right to double value is waived.

If the landlord accepts rent from the tenant after the expiration of the notice to quit, it is a question for the jury whether such rent was received in part satisfaction of the double value, or as a waiver of it. (*e*) And where the landlord declared in debt, 1st, for the double value; and 2ndly, for use and occupation; and the tenant pleaded *nil debet* to the first count, and a tender of the single rent before action brought to the second, and paid the money into court, which the plaintiff took out before trial and proceeded; it was held, that this was no waiver of the plaintiff's right to proceed for the double value, so as to nonsuit the plaintiff; but that the case ought to have gone to the jury; and that the plaintiff going on with the action after taking the single rent out of court, was evidence to shew, that he did not mean to waive his claim for the double value, but to take the single rent *pro tanto*. (*f*)

A recovery in ejectment is not a waiver of the landlord's right to the double value for the time between the expiration of the notice to quit, and the time of recovering possession under the ejectment. (*g*)

One tenant in common may sue for the double value without joining his cotenant. (*h*)

(*a*) Cobb v. Stokes, 8 East, 361; and see Cutting v. Derby, 2 Wm. Bl. 1075.
(*b*) *Ibid.*
(*c*) Lake v. Smith, 1 Bos. and Pul. N. R. 174.
(*d*) Wilkinson v. Colley, 5 Burr. 2694.
(*e*) Ryal v. Rich, 10 East, 52; and see Doe d. Cheny v. Batten, Cowp. 243.
(*f*) Ryal v. Rich, 10 East, 48.
(*g*) Soulsby v. Neving, 9 East, 310.
(*h*) Cutting v. Derby, 2 W. Bl. 1077.

Debt for Double Rent.

By statute 11 Geo. 2, c. 19, s. 18, if any tenant shall give notice of his intention to quit the premises holden by him, at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof, at the time in such notice contained, then such tenant, his executors, or administrators, shall thenceforward pay to the landlord double the rent, or sum, which he should otherwise have paid, to be levied, sued for, and recovered, at the same times, and in the same manner as the single rent or sum, before the giving such notice, could be levied, &c., and such double rent or sum, shall continue to be paid during all the time such tenant shall continue in possession. (*a*)

As this statute directs the double rent to be recovered in the same manner as the single rent, the landlord may maintain either debt or assumpsit in case of a parol demise, or may distrain. (*b*)

The notice mentioned in this statute need not be in writing (*c*); but the time for quitting, specified in it, must be fixed; and, therefore, where a tenant from year to year gave his landlord notice, that he would quit as soon as he could possibly get another situation, and he did get another situation, it was held, by Lord Ellenborough, that he was not liable on this statute. (*d*)

Although a recovery in ejectment is not a bar to an action for double value, yet there may be some incongruity in applying the remedy for double *rent* after the remedy by ejectment. (*e*)

(*a*) It is said, in Cutting v. Derby, 2 Wm. Bl. 1077, that this statute, and the 4 G. 2, c. 28, (*ante*, p. 478) being *in pari materiâ*, ought to have the same construction; and so it is said by Chambre, J. Lake v. Smith, 1 Bos. and Pul. N. R. 180, that these statutes being *in pari materiâ*, may be considered as throwing light on each other. So far as as they are both remedial laws, (*ante*, p. 478, note *a*;) this is true; but there appears to be one strong distinction between the two statutes, that the 4 G. 2, c. 18, treats the tenant as a trespasser, while the 11 G. 2, c. 19, recognises him as a tenant, and only imposes double *rent*.

(*b*) Timmins v. Rowlison, 3 Burr. 1603.

(*c*) *Ibid.*

(*d*) Farrance v. Elkington, 2 Campb. N. P. C. 591.

(*e*) *Per* Ld. Ellenborough, Soulsby v. Neving, 9 East, 314.

Ejectment.

Nature and origin of the action.

THE action of ejectment is a possessory remedy, by which a person, who has a right of entry upon any corporeal hereditaments, may acquire the possession, whether he be tenant in fee, in tail, for life, for years, or by *elegit* or statute merchant.

In the earlier periods of the law, the right of the *freeholder* to the possession or property of lands, was always tried in a real action, adapted to the circumstances of the case; but the estate of tenant for years was deemed to be of so fragile a nature, that for a long time he possessed no means of recovering his term, if ousted by a wrong-doer. Leases for years being originally considered merely as contracts or covenants for the enjoyment of the rents and profits, the only remedy for the lessee, if ejected by his lessor, was at first a writ of covenant, in which he was entitled to recover his term and damages; or if ejected by a stranger, his damages only. (*a*) The remedy of the lessee against his lessor, or those claiming under him, was afterwards facilitated, by the introduction of the writ of *quare ejecit infra terminum*. (*b*) If the termor was dispossessed by a stranger, the *lessor* might have recovered possession of the land in assise (*c*); but the only remedy for the lessee was a writ of *ejectione firmæ*, in which, at this time, damages merely, and not the term, were recoverable. (*d*) In the reign of Edward IV. an alteration had taken place in the law, and the termor was allowed to recover, not only damages, but likewise his term (*e*); and in the time of Elizabeth, the *ejectio firmæ* appears to have become the common form of action, for the trial of titles to land. (*f*)

(*a*) F. N. B. 145 L. Br. Ab. Cov. 33. 3 Bl. Com. 156, 200. Gilb. Eject. 2, 2nd edit.

(*b*) *Ante*, p. 98.

(*c*) *Ante*, p. 64.

(*d*) Fitz. Ab. *eject. firmæ*, 2. Jenk. Cent. 67. The writ of *ejectione firmæ* seems to have been introduced in the reign of Edw. 3. 3 Reeves' Hist. 29.

(*e*) *Dictum per* Fairfax, 7 Ed. 4, 6, b. Br. Ab. *Quare Ejec.* 6. 3 Reeves' Hist. 391. The first instance of a judgment to recover the term is in 14 Hen. 7. See Jenk. Cent. 67. Rast. Ent. 253, a. 4 Reeves' Hist. 165.

(*f*) See Alden's case, 5 Rep. 105, b. Preface to 11 Rep. xii.

Nature and origin of the action.

At this period, however, the fiction of a merely nominal plaintiff and defendant, and the practice of entering into a consent rule, to confess lease, entry, and ouster, were unknown. The plaintiff was a real person, to whom a lease was actually sealed, by the claimant, upon the land; and the defendant was also a real person who entered and ousted the plaintiff. It frequently happened, while this practice continued, that the real tenant of the land was turned out, without having an opportunity of asserting his title. In order to prevent this abuse, a rule of court was made, prohibiting the plaintiff in ejectment from proceeding against the defendant, without previously giving notice to the person actually in possession of the lands, who was then allowed by the court to defend the action, on an undertaking to indemnify the defendant, in whose name the action still proceeded. (*a*) The period at which this rule was made is uncertain; but it was probably introduced soon after the action came into common use. At length a new mode of proceeding was invented, as it is said, by Rolle, C. J., who presided in the upper bench during the Protectorate. The ancient practice of entering upon the land and sealing a lease was dispensed with; the plaintiff and defendant were no longer real persons, but the tenant in possession of the land was allowed to become defendant on entering into a rule to confess the lease to the fictitious plaintiff, his entry into the land, and his ouster by the fictitious defendant, or as he was termed, the casual ejector, and the subsequent proceedings were carried on in the name of the real tenant. (*b*)

With various improvements engrafted upon it, such continues to be the practice at the present day.

For what it lies.

Ejectment, in general, lies only for the recovery of corporeal hereditaments. With regard to the description of the things for which this action may be sustained, and the degree of certainty with which they ought to be described, it is observable, that a greater liberality prevails in the modern cases, than existed at an earlier period. (*c*) At first, it appears to have been thought, that an ejectment could not be brought for any thing

(*a*) Style, 368.

(*b*) Style, 368. Fairclaim d. Fowler v. Shamtitle, 3 Bur. 1297. Adams, Eject. 14, 2nd edit. Gilb. Eject. 5, 2nd edit.

(*c*) See Cottingham v. King, 1 Burr. 629. Connor v. West, 5 Burr. 2673.

which could not be demanded in a *præcipe* (*a*); and where an ejectment was brought for "a close, called Dovecot Close, containing three acres," without specifying the nature of the land, judgment was arrested for the uncertainty. (*b*) This strictness has since been greatly relaxed, and the courts will now permit premises to be recovered in ejectment under many names, by which they cannot be demanded in a *præcipe*. (*c*) For some time, also, an idea prevailed, that it was necessary for the description in ejectment to be so certain, that the sheriff might be able to know, without any information from the plaintiff, of what premises to give possession; but as, according to the modern practice, the plaintiff is to shew the sheriff the premises recovered, and to take possession at his peril, of that portion only to which he has title (*d*), such accuracy is no longer required. There is no objection to a *bis petitum*, or second description of the same thing in ejectment. (*e*)

For what it lies.

An ejectment will lie for a messuage, but not for a messuage *or* tenement, such description not being sufficiently certain (*f*); nor for a messuage *and* tenement. (*g*) But an ejectment for a messuage *or* tenement "called the Black Swan," has been said to be good, for the addition of the name renders it sufficiently certain (*h*), and after a verdict in ejectment for a messuage *and tenement* the court will give leave to enter the verdict according to the judge's notes, for the messuage only (pending a rule to arrest the judgment) without obliging the lessor of the plaintiff to release the damages. (*i*) An ejectment for a messuage or burgage is good, because they both signify the same thing in a

Houses and other buildings.

(*a*) See Challenor v. Thomas, 1 Bro. 142; and the argument in Macduncoh v. Stafford, 2 Roll. Rep. 166. Knight v. Symms, Comb. 198, 199.

(*b*) Savel's case, 11 Rep. 55, a; but this case has been doubted, and cannot now be considered as law. See 2 Roll. Rep. 167. Sprigg v. Rawlinson, Cro. Car. 555. Bindover v. Sindercombe, 2 Lord. Raym. 1472. Cottingham v. King, 1 Burr. 628; but see Knight v. Syms, 1 Salk. 254.

(*c*) See *ante*, p. 17, and *post*.

(*d*) Cottingham v. King, 1 Burr. 629, 630. Connor v. West, 5 Burr. 2673. Crocker v. Fothergill, 2 B. and A. 660.

(*e*) Warren v. Wakeley, 2 Roll. Rep. 482. Cottingham v. King, 1 Burr. 630. Harebottle v. Placock, Cro. Jac. 21.

(*f*) Ashworth v. Stanley, Styl. 364. Wood v. Payne, Cro. Eliz. 186. Goodright d. Welsh v. Flood, 3 Wils. 23.

(*g*) Goodtitle v. Walton, 2 Str. 834. Doe d. Bradshaw v. Plowman, 1 East, 441, overruling Doe v. Denton, 1 T. R. 11.

(*h*) *Per* Twisden, J., Burbury v. Yeomans, 1 Sid. 295. Hexham v. Coniers, 3 Mod. 238. Bindover v. Sindercombe, 2 Ld. Raym. 1470. Gilb. Eject. 56, 2nd edit.

(*i*) Goodtitle d. Wright v. Otway, 8 East, 357.

For what it lies.

borough. (*a*) Though a *house* should be demanded in a *præcipe* by the name of a messuage, yet it may be recovered in an ejectment by the name of a house. (*b*) So ejectment lies for "a cottage" (*c*), "for a warehouse" (*d*), for "a chamber or room" (*e*), for "a passage-room" (*f*), for "the fourth part of a house in N." (*g*), for "part of a house known by the name of the Three Kings in A." (*h*), for "a stable" (*i*), for "a place called the vestry" (*k*), for a chapel by the name of "a house or messuage" (*l*), for a church by the name of "a messuage" (*m*), for "four mills," without expressing whether they are wind-mills or water-mills. (*n*) If a person eject another from land, and build part of a house upon the land, the whole may be recovered under the name of "land." (*o*)

Land.

In ejectment for land, the particular quality should be mentioned, for the word "land" in its legal occupation signifies arable land (*p*); but it seems not to be necessary to specify the particular quantity of each quality, thus an ejectment for "fifty acres of furze and heath," without mentioning how many acres of each, has been held good on error. (*q*) Ejectment will not lie for "a close" (*r*), but where a name is given to it, the description appears to be sufficiently certain, although the number of acres, or the quality of land be not stated. (*s*) Ejectment will not lie for

(*a*) Danvers v. Wellington, Hard. 173. Gilb. Eject. 57, 2d edit.

(*b*) Royston v. Eccleston, Cro. Jac. 654. Gilb. Eject. 54, 2nd edit.

(*c*) Hill v. Giles, Cro. Eliz. 818. Hamond v. Ireland, Styl. 215.

(*d*) Dictum of the Court, Sprigg v. Rawlinson, Cro. Car. 554. Gilb. Eject. 57, 2nd edit.

(*e*) *Ibid.* Anon. 3 Leon. 210.

(*f*) Bindover v. Sindercombe, 2 Ld. Raym. 1470.

(*g*) Rawson v. Maynard, Cro. Eliz. 286.

(*h*) Sullivane v. Seagrave, 1 Str. 695.

(*i*) Lady Dacre's case, 1 Lev. 58.

(*k*) Hutchinson v. Puller, 3 Lev. 96. Recognised, 2 Ld. Raym. 1471.

(*l*) Harper's case, 11 Rep. 25, b. Doctr. Pl. 291. Gilb. Eject. 68, 2nd edit.

(*m*) Hollingsworth v. Brewster, 1 Salk. 256, for a prebendal stall after admission; *arg.* R. v. Bp. of London, 1 Wils. 14.

(*n*) Fitzgerald v. Marshall, 1 Mod. 90.

(*o*) Goodtitle d. Chester v. Alker, 1 Burr. 144, but if the whole of a house be built on the premises, it would be more proper so to name it. *Ibid.*

(*p*) Savel's case, 11 Rep. 55, a. *Ante*, p. 483.

(*q*) Connor v. West, 5 Burr. 2672. Fitzgerald v. Marshal, 1 Mod. 90, but there are several old cases contra, Knight v. Syms, 1 Salk. 254. Carth. 204, S. C. Martyn v. Nichols, Cro. Car. 573.

(*r*) Savel's case, 11 Rep. 54. 1 Roll. R. 55, S. C. Knight v. Syms, 1 Salk. 254. 1 Show. 338. Carth. 204, S. C.

(*s*) Royston v. Eccleston, Cro. Jac. 654. Lady Dacre's case, 1 Lev. 58. Jones v. Hoel, Cro. Eliz. 235. Barbary v. Yeomans, 1 Sid. 295; but there are several cases *contra*, Savel's case, 11

"a piece of land" (*a*), but it will lie for "ten acres of pease," for in common acceptation, ten acres of pease, and ten acres sowed with pease, signify the same thing (*b*); so ejectment lies for "underwood" (*c*), and for an "orchard" (*d*), and for so many acres of "land covered with water," but not for a water-course or rivulet. (*e*) For what it lies.

It will be sufficient if land is described by the provincial term by which it is known in the county where it lies. Thus an ejectment may be maintained for so many acres of "Alder Carr" in Norfolk, such term in that county signifying land covered with alders (*f*), so for "cattle-gates" in Yorkshire (*g*), so for "beast-gate," which imports land and common for one beast in Suffolk. (*h*) So an ejectment may be maintained in Ireland, for so many acres "of mountain" (*i*), or for so many acres of "bog" (*k*), or for a "quarter of land" (*l*), for by such names the quality of land in Ireland is understood; but an ejectment in England for one hundred acres of mountain, or one hundred acres of waste, has been held bad for uncertainty, because mountain and waste in England comprehend land of various quality. (*m*)

Ejectment has been brought for a boilary of salt, although the claimant was only entitled to a certain number of buckets of salt-water drawn out of the well. (*n*) The reason of ejectment lying in this case is said to be, because the water is fixed in a certain place, within the bounds and compass of the well, and is considered as part of the soil. (*o*)

It is said, in some old cases, that it is not safe to bring eject-

Rep. 54. Knight v. Syms, 1 Salk. 254. Show. 338. Carth. 204, S. C. Palmer's case, Owen, 18. Jordan v. Cleabonrne, Cro. Eliz. 339, the court divided, and see Wykes v. Sparrow, Cro. Jac. 435. Hutchinson v. Puller, 3 Lev. 97. Vin. Ab. Eject. (L).

(*a*) Palmer v. Humphrey, Moor, 702. Owen, 18, S. C.

(*b*) Odingsall v. Jackson, 1 Brownl. 149.

(*c*) Warren v. Wakeley, 2 Rol. Rep. 485.

(*d*) Wright v. Wheatley, Cro. Eliz. 854.

(*e*) Challenor v. Thomas, Yelv. 143. 1 Brownl. 142, S. C.

(*f*) Barnes v. Peterson, 2 Str. 1063.

(*g*) *Per* Lee, J. *ibid.*

(*h*) Bennington v. Goodtitle, 2 Str. 1084.

(*i*) Ld. Kildare v. Fisher, 1 Str. 71. Cottingham v. King, 1 Burr. 629.

(*k*) Mulcarry v. Eyres, Cro. Car. 511.

(*l*) Cottingham v. King, 1 Burr. 623.

(*m*) Hancocke v. Price, Hard. 57.

(*n*) Sanders v. Partridge, Noy, 132. Smith v. Barrett, 1 Sid. 161. 1 Lev. 114, S. C. Commyn v. Kincto, Cro. Jac. 150, by the grant of a boilary it is said the soil passes, for it is the whole profit of the soil, Co. Litt. 4 b.

(*o*) Gilb. Eject. 62, 2nd edit.

For what it lies.

ment for a manor, without stating the quantity and quality of the land therein (*a*); but as a manor may be demanded by that name in a *præcipe* (*b*), it seems to be a good description in ejectment. If the manor be only a manor by reputation, it should not be described by the name of a manor. (*c*)

Under the name of land, the plaintiff may recover land subject to a public easement, as the king's highway, and it will not vitiate the description, that a wall, or part of a house, has been built upon the land. (*d*)

Prima tonsura and herbage.

An ejectment may be maintained *pro primâ tonsurâ*, where a man has a grant of the first grass which grows on the land every year. (*e*) And so for hay-grass, and after-math; and a right to the herbage is sufficient to maintain ejectment, though by such grant, the soil itself does not pass (*f*), but the ejectment should be for the herbage of the land, and not for the land itself (*g*); ejectment will also lie for "pasture for one hundred sheep," that is for so much land as will feed a hundred sheep. (*h*)

Mines.

Ejectment will lie for a "coal-mine," (*i*) So ejectment for land, and a coal-pit in the same land, has been held to be good. (*k*) And where ejectment was brought in Durham for "coal-mines in the parish of D." generally, without mentioning the number of the mines, the court on error, finding the precedents of ejectments in Durham were in that form, affirmed the judgment. (*l*) A person who has a mere licence to dig and search for minerals, cannot maintain ejectment; such licence

(*a*) Norris v. Isham, Hetley, 81. Warden's case, *Ib.* 146. Cole v. Aylott, Litt. Rep. 301. Hems v. Stroud, Latch, 61. Gilb. Eject. 60, 2nd edit.

(*b*) Thel. Dig. l. 8, c. 2.

(*c*) Hems v. Stroud, Latch, 163.

(*d*) Goodtitle d. Chester v. Alker, 1 Burr. 158.

(*e*) Ward v. Petifer, Cro. Car. 362. Parker v. Staniland, 11 East, 366, and it should be demanded by that name; but if demanded by the name of land, it seems that *prima tonsura* would be presumptive evidence of a right to the freehold. See Stammers v. Dixon, 7 East, 208.

(*f*) Wheeler v. Toulson, Hard. 330, and see R. v. Inhab. of Stoke, 2 T. R. 451. A lease of the vesture or herbage of land reserving rent is good. Gilb. Rents, 26.

(*g*) Stammers v. Dixon, 7 East, 207, Gilb. Evid. 219, 4th edit.

(*h*) 2 Dal. 95. Gilb. Eject. 64, 2nd edit.

(*i*) Commyn v. Kincto, Cro. Jac. 150. Noy, 121. Gilb. Eject. 61, 2nd edit.

(*k*) Harbottle v. Placock, Cro. Jac. 21.

(*l*) Andrews v. Whittingham, Carth. 277. 1 Salk. 255. 4 Mod. 143, S. C. Dower of a mine worked, Stoughton v. Leigh, 1 Taunt. 402, but not a recovery, Pigot, 96.

gives nothing more than a right to a personal chattel when obtained in pursuance of incorporeal privileges granted for the purpose of obtaining it, and is very different from a grant or demise of the mines or minerals in the land (*a*), but although an ejectment will not lie for a liberty and privilege alone, which is a mere incorporeal hereditament; yet when an ejectment is brought for land, and liberties and privileges are appurtenant to the land, they may be recovered with the land, because you may recover in the ejectment all incorporeal things included in the demise, although an ejectment will not lie for the incorporeal things alone. (*b*) For what it lies.

A right of common being a mere incorporeal hereditament, cannot be recovered by itself in ejectment (*c*); but common appendant or appurtenant may be recovered in an ejectment brought for the lands to which it is appendant or appurtenant; and it should be so described. (*d*) Where ejectment was brought for lands, and also for common of pasture, without stating the kind of common, it was held not to be error, for after verdict the court would intend it to be common appendant or appurtenant. (*e*) Commons.

By virtue of the statute, 32 Hen. 8, c. 7, an ejectment may be maintained for tithes in lay hands against a person who claims title to them, and they need not be claimed as appertaining to a rectory or chapel. (*f*) Although the quantity of the tithes need not to be mentioned, yet the kinds should be stated. (*g*) An eject- Tithes.

(*a*) Doe d. Hanley v. Wood, 2 B. and A. 724. Prest. Shep. Touch. 96. Chetham v. Williamson, 4 East, 469.

(*b*) *Per* Holroyd, J. Crocker v. Fothergill, 2 B. and A. 661. Tenant in fee is entitled to all minerals and metals in his land, except gold and silver, Lyddall v. Weston, 2 Atk. 19. Though the lord of a manor in Cornwall may establish a right to the tin mines in the soil of his freeholders. Curtis v. Daniel, 10 East, 274. But the mines in copyhold lands belong to the lord, and neither the tenant without the licence of the lord, nor the lord without the consent of the tenant, can open the mines. Bp. of Winch. v. Knight, 1 P. Wms. 406. Gilb. Ten. 327. 10 East, 189. 2 T. R. 705, but copyholders may by acts of ownership for more than twenty years establish their right to mines. Curtis v. Daniel, 10 East, 273.

(*c*) Weekes v. Mesey, 1 Brownl. 129. Barton v. Hamshire, 3 Keb. 738. *Anon.* Freem. 447. Gilb. Eject. 62, 2nd edit.

(*d*) Newman v. Holdmyfast, 1 Str. 54. Baker v. Roe, cases Temp. Hardw. 127. Barton v. Hamshire, 3 Keb. 738.

(*e*) *Ibid.*

(*f*) Priest v. Wood, Cro. Car. 301. Gilb. Eject. 67, 2nd. edit.

(*g*) Harper's case, 11 Rep. 25, b. Ibgrave v. Lee, Dyer, 116, b. It is said that ejectment will lie for small tithes, Cammel v. Clavering, 2 Ld. Raym. 789.

For what it lies.

ment only lies of tithes in kind, and not where the tithing consists *in modo decimandi* for payment of an annual sum. (*a*)

Piscary.

It is laid down in several cases, that ejectment will not lie for a piscary (*b*), but whether such an action can be maintained seems to depend upon the nature of the fishery. If it be merely a common of piscary, it is only a profit *a prendre*, and ejectment will not lie for it; but if it be a several fishery, which, as it seems, is presumed to comprehend the soil, or if the lessor of the plaintiff claim under a grant of a fishery *generally*, which, as it seems, *primâ facie*, implies a right to the soil, ejectment appears to be maintainable (*c*), and the land may be recovered under the name of a piscary.

Incorporeal hereditaments.

Ejectment will not lie for an incorporeal hereditament as for rent (*d*), nor for a mere profit *a prendre* as pannage. (*e*)

Title.

Plaintiff must recover on the strength of his own title.

The claimant in ejectment must recover on the strength of his own title, and not on the weakness of the defendants, for the possession of the latter gives him a right against every one who cannot establish a good title; and it is sufficient for him if he can shew the real title of the land to be out of the lessor of the plaintiff. (*f*) It has indeed been thought that mere *priority of possession* is a sufficient title in ejectment. (*g*) Priority of possession would certainly be *primâ facie* evidence of a seisin in fee (*h*); and unless rebutted by the defendant, would enable the lessor of the plaintiff to recover, but in any other sense the position seems to be at variance with the rule, that the plaintiff in ejectment must recover on the strength of his own title. It has also been laid down that twenty years adverse possession, since

(*a*) Gilb. Eject. 66, 2nd edit.

(*b*) Herbert v. Laughluyn, Cro. Car. 492. Waddy v. Newton, 8 Mod. 278. Molineux v. Molineux, Cro. Jac. 144.

(*c*) See Mr. Hargrave's note to Co. Litt. 122, a. (n. 7.) 4 b, note 2, and the cases there cited, and R. v. inhabitants of Old Alresford, 1 T. R. 361. Com. Dig. Pischary, (A).

(*d*) Herbert v. Laughluyn, Cro. Car. 492.

(*e*) Pemble v. Sterne, 1 Lev. 212, 13. 1 Sid. 416, S. C.

(*f*) Martin v. Strachan, 5 T. R. 110, note. Roe d. Haldane v. Harvey, 4 Burr. 2487. Doe d. Crisp v. Barber, 2 T. R. 749. England d. Syburn v. Slade, 4 T. R. 682. Doe d. Jackson v. Ramsbotham, 3 M. and 516.

(*g*) Allen v. Rivington, 2 Saund. 111, but see note (o) 5th edition. 4 Taunt. 548, (n). 1 Chitty, Pl. 192 (n) 3d edit.

(*h*) "If no other title appears a clear possession of twenty years is evidence of a fee," per Ld. Mansfield, Dean v. Barnard, Cowp. 597. See Peaceable v. Watson, 4 Taunt. 17. Doe d. Pitcher v. Anderson, 1 Stark. N. P. C. 268.

Title.

Plaintiff must recover on the strength of his own title.

the statute of limitations, 21 Jac. 1, c. 16, is a sufficient title in ejectment. Thus it was ruled by Lord Holt, that if H. has possession of land for twenty years uninterrupted, and then B. gains possession, upon which H. brings ejectment, though H. is plaintiff, yet his possession for twenty years will be a good title for him, as well as if H. had been then in possession, because possession for twenty years by virtue of the statute, 21 Jac. 1, c. 16, s. 1, is like a descent at common law, which tolls the entry. (*a*) The same position is laid down in Buller's *Nisi Prius*, on the authority of the above case, and the reason given is, that twenty years possession tolls the entry of the person having right, and consequently, that though the very right be *in the defendant*, yet he cannot justify his ejecting the plaintiff. (*b*) This position can only be supported by holding that the statute of limitations gives a title to the party in possession (*c*), sufficient to satisfy the rule, that the lessor of the plaintiff shall only recover on the strength of his own title. It is also said, that a man may make title in ejectment by a collateral warranty (*d*), and yet such warranty is merely a bar, and confers no right. (*e*) In a late case it was held that the statute of 9 Geo. 3, c. 16, which bars the suit of the crown after an adverse possession of sixty years, does not give a title. (*f*)

The rule that the plaintiff in ejectment must recover upon the strength of his own title, is qualified in its application to the case of landlord and tenant, for a tenant who has come in under the lessor of the plaintiff will not be allowed to controvert his title, although he may shew that it has subsequently expired (*g*); nor will it be necessary for the lessor of the plaintiff to give any other evidence of his title than the demise. (*h*)

(*a*) Stocker v. Berny, 1 Ld. Raym. 741. 2 Salk. 421, S. C. recognised in Cholmondeley v. Clinton, 2 Jac. and Walk. 156.

(*b*) p. 103, and see 2 Salk. 685.

(*c*) "Twenty years is sufficient to give a man a title in ejectment," *per* Wilmot, J. in Lewis v. Price, 2 Saund. 175, notes, 5th edit. "Twenty years adverse possession is a positive title to the defendant. It is not a bar to the action or remedy of the plaintiff only, but takes away his right of possession." *Per* Ld. Mansfield, Taylor v. Horde, 1 Burr. 119. So it is said by the Master of the Rolls, in Cholmondeley v. Clinton, 2 Jac. and Walk. 156, that the statute gives a positive title at law, but see Hunt v. Burn, 2 Salk. 422, where it is said that the statute of limitation operates by way of *bar to the remedy*, and that the word *right* there is right of entry.

(*d*) Smith v. Tyndal, 2 Salk. 685.

(*e*) *Ante*, p. 215.

(*f*) Goodtitle d. Parker v. Baldwin, 11 East, 488.

(*g*) *Ante*, pp. 452, 459.

(*h*) See *post*.

Title.

Plaintiff must recover on the strength of his own title.

So it has been held that a party may be estopped from disputing the title of another in ejectment, by referring the question of the right to the land to an arbitrator, who makes an award in favour of the lessor of the plaintiff, who may recover in ejectment. (*a*)

Title must be a legal one.

Statute of uses.

The claimant must be clothed with the legal title to the lands (*b*), and a trustee having the legal estate is entitled to bring ejectment, even against his *cestui que trust*. Wherever, therefore, in a conveyance to uses, the statute of uses does not execute the use in the *cestui que use*, the feoffee, &c. to uses has the legal estate, and may bring ejectment; thus where an use is limited upon an use, the latter use is not executed, but the legal estate is vested in him to whom the first use is limited. (*c*) The statute of uses does not extend to copyholds, for it is against the nature of such tenure that any person should be introduced in the estate without the consent of the lord (*d*); nor to leases for years actually in existence at the time of their being assigned to uses, for the statute only speaks of persons standing *seised*, and no use therefore can arise out of a term for years; but if a person seised in fee makes a conveyance for a term of years to uses, by bargain and sale, the uses are served out of the seisin of the bargainor, and are executed by the statute. (*e*)

Devises in trust.

With regard to devises in trust, the trustees will be held to have the legal estate or not, so as the intention of the testator may be best effectuated. (*f*) The rule is, that where something is to be done by the trustees, which makes it necessary for them to have the legal estate, such as payment of the rents and profits to another's separate use, or of the debts of the testator, or to pay rates and taxes, and keep the premises in repair, or the like, the legal estate is vested in them, and the grantee or devisee has

(*a*) Doe d. Morris v. Rosser, 3 East, 11, but see the observations of Sir W. D. Evans on this case in Chamb. Land. and Ten. 267. See also Hunter v. Rice, 15 East, 100.

(*b*) Roe d. Reade v. Reade, 8 T. R. 118, 123. Doe d. Shewen v. Wroot, 5 East, 138, overruling the doctrine of Ld. Mansfield's time, Lade v. Holford, B. N. P. 110. Keech d. Hall v. Warne, Dougl. 21. Doe d. Bristow v. Pegge, 1 T. R. 759, (n).

(*c*) Tyrrel's case, Dy. 155. Robinson v. Comyns, Cases temp. Talb. 164. Gilb. Uses, 161.

(*d*) Gilb. Ten. 182. Co. Copyh. s. 54.

(*e*) Dillon v. Fraine, Poph. 70, 76. Jenk. Cent. 244. Bac. Uses, 42. Dyer, 369, a. 2 Inst. 671. Gilb. Uses, 198.

(*f*) See Gregory v. Henderson, 4. Taunt. 775. Harton v. Harton, 7 T. R. 653.

Title.

Must be a legal one.

Devises in trust.

1. *For a married woman.*

only a trust estate. (*a*) As where lands were devised to trustees and their heirs, in trust for a married woman and her heirs, and that the trustees should from time to time pay the rents and profits to her or to such person as she, by any writing under her hand, as well during coverture, as being sole, should appoint, without the intermeddling of her husband; the court held it to be a trust only, and not an use executed by the statute. (*b*) So where lands were devised to trustees and their heirs, in trust to pay out of the rents and profits several legacies and annuities, and to pay all the residue of the rents and profits to the proper hands of a married woman during her life, or as she should direct; and after her death, the trustees to stand seised to the use of the heirs of her body with remainders over, it was decreed that this was an use executed in the trustees during the life of the married woman, but that upon her death, the legal estate vested in the heirs of her body; and this decree was affirmed in the House of Lords. (*c*) So also where the devise was to trustees and their heirs, upon trust, to permit a married woman to receive the rents and profits during her life, for her sole and separate use, notwithstanding her coverture, and without being in any wise subject to the debts or control of her then or after taken husband, and her receipt alone to be a sufficient discharge, with remainder over, the legal estate was held to be vested in the trustees. (*d*)

2. *For payment of debts, or other act.*

So where lands are devised to trustees in trust to pay the debts of the testator, or to pay rates and taxes, &c. or to sell, the legal estate will be vested in the trustees. Thus where lands were devised to trustees and their heirs, in trust to pay out of the rents and profits, after deducting rates, taxes, and repairs, such clear sum as should then remain to C. S. for life, with remainder over; it was held that the use was executed in the trustees during the life of C. S. (*e*) And so where lands were devised to trustees and their heirs in trust, that they should, out

(*a*) Serj. Williams's note, 2 Saund. 11, b. "I cannot lay down the principle in better terms," *per* Lord Alvanley, C. J. in Kenrick v. Beauclerk, 3 Bos. and Pul. 178. See Doe d. Player v. Nicholls, 1 Barn. and Cres. 343. Fearne's Op. 422.

(*b*) Nevil v. Saunders, 1 Vern. 415.

(*c*) Say and Sele v. Jones, 3 Vin. 262. 1 Eq. Ca. Ab. 383. 3 Br. Parl. Ca. 458. Fearne, 52. And see Heny v. Purcell, 2 W. Bl. 1002.

(*d*) Harton v. Harton, 7 T. R. 652.

(*e*) Shapland v. Smith, 1 Br. C. C. 75. Fearne, 57. Silvester d. Law v. Wilson, 2 T. R. 444. Chapman v. Blisset, Forrest, 145.

Title.

Must be a legal one.

of the rents and profits, or by sale or mortgage of the whole, or so much of the estate as should be necessary, raise a sum sufficient to pay the testator's debts, and after payment thereof the testator gave the same to his trustees for five hundred years, without impeachment of waste, and from and after the determination of the said estate for years, then he gave and devised all his said lands, &c. to the said trustees, their heirs and assigns, his mind being that his said trustees should be and stand seised of the said premises in trust to the several uses, &c. after declared, viz. as to one moiety of the said premises he gave and devised the same to the use and behoof of his nephew T. B. for the term of his natural life, without impeachment of waste, &c. one question was whether the legal estate vested in the trustees; Lord Hardwicke was of opinion that the devise to the trustees and their heirs carried the whole fee to them, and therefore the estate for life, as well as the estates in remainder, were merely trust estates in equity, that part of the trusts were to sell the whole or a sufficient part of the estate for the payment of debts and legacies, which would carry a fee by construction, though the word heirs were omitted in the devise. (*a*) The same rule of construction is adopted in cases of deeds in trust to sell, as in that of devises. (*b*) But a mere charge for the payment of debts will not give the trustees the legal estate, unless the testator intend that the trustees shall be active in paying the debts. (*c*)

Distinction between trust to receive and pay, and to permit cestui que trust to receive.

A distinction is taken between a trust *to receive the rents and profits and pay them over;* in which case the legal estate will vest in the trustee; and a trust *to permit and suffer A. to receive the rents and profits,* in which latter case the use is executed in A. (*d*); unless it be necessary, that the use should be executed in the trustees, as in the case of Harton v. Harton. (*e*)

Duration of the trust.

Where the purposes of a trust can be answered by a less estate than a fee simple, a greater interest than is sufficient to answer such purposes will not pass to the trustees, but the uses in remainder limited on the lesser estate given to them, will be

(*a*) Bagshaw v. Spencer, 1 Coll. Jur. 378. 1 Ves. 143. 2 Atk. 246, 570, S. C. Garth v. Baldwin, 2 Ves. 646.

(*b*) Keene d. Lord Byron v. Deardon, 8 East, 248.

(*c*) Kenrick v. Beauclerk, 3 Bos. and Pul. 175.

(*d*) Broughton v. Langley, 1 Lutw. 814, 823. 2 Ld. Raym. 873. 2 Salk. 679, S. C. 2 Saund. 11, d. note. Doe d. Leicester v. Biggs, 2 Taunt. 109. Right d. Phillips v. Smith, 12 East, 455. Fearne, 159.

(*e*) *Ante*, p. 491, Gregory v. Henderson, 4 Taunt. 772.

executed by the statute (*a*); for it may be laid down as a general rule, that where an estate is devised to trustees, for particular purposes, the legal estate is vested in them as long as the execution of the trust requires it, and no longer; and, therefore, as soon as the trusts are satisfied, it will vest in the person beneficially entitled to it. (*b*)

Title.

Must be a legal one.

Although where a legal estate is outstanding in a trustee, he alone is entitled to maintain an action of ejectment, yet, in certain cases, a jury will be directed to presume a conveyance of the legal estate from him to the *cestui que trust*, so as to enable the latter to recover in this action. This presumption is a question of fact, upon which the jury are to decide, from a consideration of all the circumstances which tend to prove or to negative it (*c*); paying at the same time, a due regard to those presumptions of law which the courts have established. (*d*)

Presumption of conveyance.

In the case of Lade v. Holford (*e*), Lord Mansfield declared, that he and many of the judges had resolved never to suffer a plaintiff in ejectment to be nonsuited by an outstanding term in his own trustee, or a satisfied term set up by a mortgagor against a mortgagee, but would direct the jury to presume it surrendered; and Lord Kenyon, though disinclined to permit ejectments to be maintained upon equitable titles, always admitted, that it might be left to the jury to presume a conveyance of the legal estate, and so far acceded to Lord Mansfield's doctrine in Lade v. Holford. (*f*)

In the case of England d. Syburn v. Slade (*g*), where trustees were directed to convey to a devisee on his attaining twenty-one; in an ejectment brought within four years from his attaining that age, it was held, that a jury might presume a conveyance from the trustees in pursuance of their trust. And so in a very

(*a*) *Per* Ld. Ellenborough, C. J. in Doe d. White v. Simpson, 5 East, 171; and see Say and Sele v. Jones, 3 Br. P. C. 458; and Mr. Butler's note to Fearne, p. 54, (a).

(*b*) *Per* Bayley, J. Doe d. Player v. Nicholls, 1 B. and C. 342.

(*c*) Doe d. Fenwick v. Read, 5 B. and A. 237. See Mr. Starkie's Observations, Treat. on Evid. vol. iii. p. 1227.

(*d*) Hillary v. Waller, 12 Ves. 252, where the Master of the Rolls says, "that presumptions do not always proceed upon the belief, that the thing presumed has actually taken place."

(*e*) Bull. N. P. 110.

(*f*) Goodtitle d. Jones v. Jones, 7 T. R. 45. Doe d. Hodsden v. Staple, 2 T. R. 696. Hillary v. Waller, 12 Ves., 251.

(*g*) 4 T. R. 682.

Title.

Must be a legal one.

Presumption of conveyance.

late case (*a*), where a term of 1000 years was created by deed in 1717, and in 1735 was assigned for the purpose of securing an annuity to A., and after that to attend the inheritance; A. having died in 1741, and the estate having remained undisturbed in the hands of the owner of the inheritance, and her devisee, from 1735 to 1813, without any notice having been in the meantime taken of the term, except that in 1801 the devisee, in whose possession the deeds creating and assigning it were found, covenanted to produce those deeds when called for; it was held, that under these circumstances the jury were warranted, in an ejectment brought for the premises by the heir at law, in presuming a surrender of the term. In a still later case a term of years was created in 1762 (*b*), and assigned over to a trustee in 1779, to attend the inheritance. In 1814, the owner of the inheritance executed a marriage settlement; and in 1816, he conveyed his life-interest in the estate to a purchaser as a security for a debt; but no assignment of the term or delivery of the deeds relating to it took place on either occasion. In 1819, an actual assignment of the term was made by the administrator of the trustee in 1779, to a new trustee for the purchaser in 1816. Under these circumstances it was held, in an ejectment brought by a prior incumbrancer against the purchaser, that the jury were warranted in presuming, that the term had, previously to 1819, been surrendered. But in a subsequent case, before Lord Eldon, C. his lordship, referring to the above decision, declared, that he would not have directed a jury to presume a surrender of the term in that case, and that he did not concur with the doctrine there laid down. (*c*)

But although, in certain cases, a satisfied term may be presumed to have been surrendered, yet an unsatisfied term, raised for the purpose of securing an annuity, may be set up during the life of the annuitant, as a bar to the plaintiff in ejectment, even though he claim only subject to the charge (*d*); and though where the beneficial occupation of an estate by the possessor, has given reason to suppose, that possibly there may have been a convey-

(*a*) Doe d. Burdett v. Wrighte, 2 B. and A. 710.

(*b*) Doe d. Putland v. Hilder, 2 B. and A. 782.

(*c*) Aspinall v. Kempson, Sugd. Vend. and P. 427, 6th edit.; and see Mr. Sugden's observations. See also 3 Starkie, Evid. 1232, note, "the court," says Mr. Starkie, "relied principally upon the force of the circumstantial evidence, to prove a surrender in fact."

(*d*) Doe d. Hodsden v. Staple, 2 T. R. 684.

Title.

Must be a legal one.

Presumption of conveyance.

ance of the legal estate to the person who is equitably entitled to it, a jury may be advised to presume a conveyance of the legal estate, yet if it appear in a special verdict, or special case, that the legal estate is outstanding in another person, the party not clothed with the legal estate cannot recover in a court of law. (*a*) And where an old mortgage term of 1000 years, created in 1727, was recognised in a marriage settlement of the owner of the inheritance in 1751, by which a sum of money was appropriated to its discharge, and no further notice of it was taken till 1802, when a deed, to which the then owner of the inheritance and the representatives of the termors were parties, reciting, that the term was still subsisting, conveyed it to others to secure a mortgage, it was held, that the term could not be presumed to have been surrendered against the owner of the inheritance, who was interested in upholding it. (*b*) So where the ancestor of the defendant came into possession of certain lands in 1752, as a creditor under a judgment obtained against the then owner of the land, and defendant's family had continued in possession ever since, it was held, that the original possession having been taken, not under any conveyance, the length of possession was only *primâ facie* evidence, from which a jury might infer a subsequent conveyance by the original owner, or some of his descendants, but that it might be rebutted, and that the jury must not presume such conveyance from length of possession, unless they were satisfied, that it had actually been executed. (*c*) So also where successive rectors had been in possession of land for above fifty years; but it appeared, that the absolute seisin in fee of the same land was in certain devisees since the statute 9 Geo. 2, c. 36, and that no conveyance was enrolled, according to the first section of that act, nor any disposition of it made to any college, &c. according to the fourth section; it was held, that no presumption could be made of any such conveyance enrolled, (which, if it existed, the party might have shewn). (*d*) In no case can a presumption of a surrender be made where it would have been contrary to the duty of the trustees to have reconveyed to the party. (*e*)

(*a*) *Per* Lord Kenyon, C. J. Roe d. Reade v. Reade, 8 T. R. 122. Goodtitle d. Jones v. Jones, 7 T. R. 45.

(*b*) Doe d. Graham v. Scott, 11 East, 478. Sugd. V. and P. 407, 6th edit.

(*c*) Doe d. Fenwick v. Reed, 5 B. and A. 232.

(*d*) Wright v. Smythies, 10 East, 409. Doe d. Howson v. Waterton, 3 B. and A. 149.

(*e*) Keene d. Lord Byron v. Deardon, 8 East, 267.

Title.

Must be a legal one.

Presumption of conveyance.

Whether a jury is justified in presuming a conveyance of the legal estate, must depend upon the circumstances of each particular case. The presumption may be founded on a variety of facts. Thus where an estate is directed to be conveyed, a jury may presume that it has been so conveyed (*a*), according to the maxim of law, that what ought to have been done, may be presumed to have been done. (*b*) So where it is for the interest of the owner of the inheritance, that a satisfied term should be considered as surrendered; and it appears, that no beneficial purpose can be answered by the continuance of the term; this is a circumstance which may guide a jury in presuming a surrender of such term. (*c*) So also in the case of a satisfied term, where acts are done or omitted by the owner of the inheritance, and persons dealing with him, as to the land, which ought not reasonably to be done or omitted, if the term existed in the hands of a trustee, and there does not appear to be any thing to prevent a surrender from having been made, those acts are evidence from which a jury may presume such surrender. (*d*)

On the other hand, where a term of years becomes attendant upon the inheritance, either by operation of law, or by special declaration, upon the extinction of the objects for which it was created, the enjoyment of the land by the owner of the reversion, thus become the *cestui que trust* of the term, may be accounted for by the union of the two characters of *cestui que trust* and inheritor; and there appears, therefore, to exist no circumstance from which a jury can imply a surrender. (*e*) The mere fact of a term being satisfied, furnishes no ground from which the jury can presume it surrendered. (*f*) There ought to be some dealing with the term to authorise such a presumption. (*g*) Where a term has been *expressly assigned to attend the inheritance,* and no act has been done, or omitted to be done, inconsistent with the existence of the term, there is still less ground to presume a surrender from the mere lapse of time, and silence of the party who possesses the inheritance. "It were too much," observes Mr. Sugden, "to presume a surrender of a term which the

(*a*) Doe d. Syburn v. Slade, 4 T. R. 682. *Ante*, p. 493.

(*b*) Hillary v. Waller, 12 Ves. 251.

(*c*) Doe v. Wrighte, 2 B. and A. 720. *Ante*, p. 494.

(*d*) Doe d. Putland v. Hilder, 2 B. and A. 791. *Ante*, p. 494.

(*e*) Doe d. Putland v. Hilder, 2 B. and A. 291. *Ante*, p. 494.

(*f*) Evans v. Bicknell, 6 Ves. 185.

(*g*) Evans v. Bicknell, 6 Ves. 185. Cholmondeley v. Clinton, cited Sugd. Vend. & P. 486, 6th edit.

owner has so anxiously kept distinct from the inheritance." "Upon principle, therefore," continues Mr. Sugden, "a term of years assigned to attend the inheritance, ought not to be presumed to be surrendered, unless there has been an enjoyment inconsistent with the existence of the term, or some act done to disavow the tenure under the termor, and to bar it as a continuing interest." (*a*) Again, the recognition of the term as subsisting at a late period (*b*); the fact that it would have been contrary to the duty of the trustees to surrender the estate (*c*); or that the original enjoyment of the party who sets up the presumed conveyance was consistent with the fact of there having been no conveyance (*d*),—all these are circumstances from which the jury may infer, that no such presumed conveyance has taken place.

Title.

Must be a legal one.

Presumption of conveyance.

An ejectment is a possessory remedy, and only competent where the lessor of the plaintiff may enter; therefore it is always necessary for the plaintiff to shew that his lessor had a right to enter, by proving a possession within twenty years, or accounting for the want of it under some of the exceptions allowed by the statute of limitations (*e*); but if the lessor of the plaintiff had such right of entry at the time of the demise laid in the declaration, it will be sufficient to maintain the action, though the right be devested before trial, for the plaintiff has a right to proceed and recover damages for the trespass, although he cannot recover the possession (*f*), and even where the lessor of the plaintiff claimed as tenant for life, the court on his death refused to stay the proceedings. (*g*)

Right of entry.

The right of entry in the lessor of the plaintiff is sufficient to support ejectment, although he has never made an actual entry, in every case except in that of a fine levied with proclamations. (*h*) By the statute 4 Hen. 7, c. 24, a fine may be

Entry to avoid a fine levied with proclamations.

(*a*) Sugd. Vend. and Purch, 389, 391, 6th edit.

(*b*) Doe d. Graham v. Scott, 11 East, 478. *Ante*, p. 495.

(*c*) Keene d. Ld. Byron v. Deardon, 8 East, 267. *Ante*, p. 495.

(*d*) Doe d. Fenwick v. Reed, 5 B. and A. 237. *Ante*, p. 495.

(*e*) *Per* Lord Mansfield, Taylor d. Atkyns v. Horde, 1 Burr. 119.

(*f*) Co. Litt. 285, a. Doe d. Morgan v. Black, 3 Campb. N. P. C. 447. Com. Dig. Abatement, (H. 5d).

(*g*) Thrustout d. Turner v. Grey, 2 Str. 1056, 3 Campb. 450.

(*h*) Goodright v. Cator, Dougl. 477. Oates d. Wigfall v. Brydon, 3 Burr. 1897. Doe v. Watts, 9 East, 19. Bull. N. P. 103.

Title.

Entry to avoid fine.

avoided, either by *action* or lawful entry; so that the party may within the five years either bring a real action, in which case no actual entry is necessary (*a*), or he may make an actual entry, and bring ejectment; but to avoid a fine at common law, *i. e.* a fine levied without proclamations, no actual entry is necessary (*b*); nor is an actual entry necessary where the ejectment has been brought before all the proclamations have been made. (*c*)

By tortious tenant in fee.

Where the fine has been levied by a person having the tortious fee as a disseisor (*d*), an actual entry is necessary to avoid it. So where a termor makes a feoffment, which operates as a disseisin, and then levies a fine, the lessor must make an actual entry to avoid the fine, though such entry may be either within five years next after the fine levied, or within five years next after the expiration of the term (*e*), for unless the latter period were allowed, the lessor might be barred by the covin of his lessee. (*f*) But where the fine is levied covinously by a termor, who continues the possession, and pays rent after the feoffment made, such fine will be void. (*g*) A distinction is taken by Sir Edward Coke (*h*), between the above case of a feoffment made by a termor, and a fine levied by him, in which case the reversioner has five years after the expiration of the term, as well as after the fine levied, and the case of a disseisin committed by a stranger to land in the possession of a termor, which operates as an ouster of the termor, and a disseisin of the reversioner; such disseisin by a stranger, according to Sir Edward Coke, bars both the lessee and lessor after five years from the fine levied, and the latter cannot enter within five years after the term ended. This distinction, which appears to be grounded on the absence of that privity between the stranger disseisor, and the reversioner, which, in the case of a fine levied after a feoffment by tenant for years, prevents the latter, who is entrusted with the possession of the land, from immediately barring the reversioner by his own wrongful act, and taking advantage of his own forfeiture, has never, as it seems, been expressly overruled. (*i*)

(*a*) *Ante*, p. 81.

(*b*) Jenkins v. Pritchard, 2 Wils. 45. Doe v. Watts, 9 East, 17. Tapner v. Merlett, Willes, 177, *contra*.

(*c*) Doe v. Watts, 9 East, 17.

(*d*) Fermor's case, 3 Rep. 79, a. Jenk. Cent. 254. Shep. Touch. 29.

(*e*) Whaley v. Tancred, T. Raym. 219. 2 Lev. 52. 1 Vent. 241, S. C.

(*f*) Fermor's case, 3 Rep. 79, a.

(*g*) Fermor's case, 3 Rep. 77. Bac. Ab. Remainder (G).

(*h*) *Note* to Margaret Podger's case, 9 Rep. 105, b, and per Catline, J. 1 Plow. Com. 374.

(*i*) In Whaley v. Tancred, *ubi sup.* the

Title.

Entry to avoid fine.

By tenant for life.

A fine with proclamations levied by tenant for life devests and displaces the reversion or remainder, and the reversioner or remainderman must therefore bring a real action, or make an entry to avoid it. (*a*) Such fine also operates as a forfeiture of the estate for life (*b*); so that he in reversion or remainder has two titles, one by reason of the forfeiture, and another by the determination of the estate for life; and may make his entry either within five years from the fine levied, or from the determination of the life estate, (as in the above mentioned case of tenant for years, who makes a feoffment and levies a fine,) for the latter title is held to be a new right, which first accrues after the death of the particular tenant, and so is within the second saving of the statute 4 H. 7, c. 24. (*c*) Where tenant for life instead of levying, merely accepts a fine from a stranger, such fine has no operation, and the remainderman, or reversioner, need not enter, but may avoid it by pleading *partes finis nihil habuerunt*. (*d*)

By tenant in tail.

Where a fine is levied by a tenant in tail, which operates as a discontinuance, the party entitled is put to his action, and therefore cannot enter (*e*), and where the fine does not operate as a discontinuance, as if it be levied by tenant in tail in remainder, it does not devest the estate in remainder, and no actual entry is necessary, nor does it bar by non-claim. (*f*)

By termor.

When a fine is levied by tenant for years without previously acquiring an estate of freehold by a feoffment, it has no manner of operation whatever, except between the parties to the fine and privies by estoppel, and the reversioner need not make an

distinction, according to the report of that case in Levinz, and T. Raymond, appears to have been misunderstood, and Sir E. Coke is represented as speaking of a fine levied by the *termor*, but in the report in Ventris, the court recognises the distinction as taken by Coke, and argues upon it as law. See also Jenk. Cent. 254. Shep. Touch. 29, (though Mr. Preston seems to deny the distinction) Wood's Inst. 248. 2 Sanders, Uses and Trusts, 94. 1 Prest. Conv. 237, and Dighton v. Grenvil, 2 Vent. 334.

(*a*) Focus v. Salisbury, Hard. 402. Podger's case, 9 Rep. 106, a. Compare v. Hicks, 7 T. R. 727. Jenk. Cent. 254.

(*b*) Co. Litt. 251, b. Smithe v. Abell, 2 Lev. 202.

(*c*) Dyer, 3 b, *margin*. Smy v. June, Cro. Eliz. 220. Laund v. Tucker, *ibid.* 254. Moor, 71. Fermor's case, 3 Rep. 78, b, 79, a. Jenk. Cent. 254. Salvin v. Clerk, Cro. Car. 157.

(*d*) Marg. Podger's case, 9 Rep. 106, b. Green v. Proude, 1 Mod. 117. *Anon.* 1 Vent. 257. 1 Saund. 319, c, (n) 5th edit.

(*e*) Bull. N. P. 99. Doe d. Odiarne v. Whitehead, 2 Burr. 704. See *ante*, p. 47.

(*f*) Prest. Shep. Touch. 23. Rowe v. Power, 2 Bos. & Pul. N. R. 1. Doe v. Harris, 5 M. and S. 326. Roe v. Elliot, 1 B. and A. 85.

Title.

Entry to avoid fine.

entry to avoid it, but *partes finis nihil habuerunt* may be pleaded to it. (*a*) The reversioner in such case, as already stated, may enter for the forfeiture, but if he grant his reversion, neither he nor his grantee can afterwards take advantage of the forfeiture. (*b*)

By jointenant, &c.

As the possession of one jointenant, parcener, or tenant in common, is the possession of his companion, a fine levied by one jointenant, &c. previously to an actual ouster, will not devest his companion's estate, and though the latter be afterwards ousted by the former, he may maintain ejectment without an actual entry. (*c*)

By reversioner or remainderman.

Where a fine with proclamations is levied by a person who has not the present freehold, but merely an estate in reversion or remainder, it devests no estate, and no entry is necessary to avoid it (*d*); though if the title of the reversioner be adverse to that of the party to be barred, there a fine levied by the reversioner may operate by non-claim, and an entry will be necessary to avoid it; as where a disseisor makes a lease for life, and afterwards levies a fine with proclamations, such fine will bar the disseisee by non-claim (*e*)

By mortgagor or mortgagee.

A fine levied by a mortgagor in possession, whether the mortgage be in fee or for a term of years, will not devest the estate of the mortgagee, so as to bar by non-claim, for the possession of the mortgagor is not adverse to the estate of the mortgagee, and no actual entry is necessary to avoid such fine. (*f*) Upon the same principle, a fine and non-claim by a mortgagee in possession will not bar the equity of redemption in the mortgagor. (*g*)

Mode of entry.

The party who enters must declare *quo animo* he enters, that it is to avoid all fines. (*h*) The entry must be made by the

(*a*) Focus v. Salisbury, Hard, 401. Smith v. Parkhurst, 18 Vin. 413, 414. Earl of Pomfret v. Windsor, 2 Ves. 481. Peaceable v. Read, 1 East, 575. Prest. Shep. Touch. 14. Doe d. Burrell v. Perkins, 3 M. and S. 271.

(*b*) Fenn v. Smart, 12 East, 444.

(*c*) Peaceable d. Hornblower v. Read, 1 East, 568. Doe d. Gill v. Pearson, 6 East, 173. Ford v. Grey, 1 Salk. 286.

(*d*) Rowe v. Power, 2 Bos. and Pul. N. R. 1. Doe v. Harris, 5 M. and S. 326. Roe v. Elliott, 1 B. and A. 85. Carhampton v. Carhampton, 1 Irish T. R. 567.

(*e*) Co. Litt. 298, a. Jenk. Cent. 254. 1 Prest. Conv. 228.

(*f*) Freeman v. Barnes, 1 Lev. 272. 1 Vent. 82, S.C. Doe d. Tarrant v. Hellier, 3 T. R. 173. 2 Ves. 482. Hall v. Doe, 5 B. and A. 687, 1 D. and R. 340, S. C. 1 Prest. Conv. 233.

(*g*) Weldon v. Duke of York, 1 Vern. 132. Kennedy v. Daly, 1 Sch. and Lef. 380.

(*h*) 13 Vin. 292. Ford v. Lord Grey, 6 Mod. 44. *Ante*, p. 80.

party claiming, or by some one appointed for him (*a*); but if a stranger enter without previous command, he may assent to such entry within the five years, and it will be sufficient (*b*), and certain persons in respect of privity may enter without previous command or subsequent assent. (*c*) The mode in which an entry should be made on lands has been already stated (*d*), and if prevented by force, &c. a continual claim may be made. (*e*)

Title.

Entry to avoid fine.

By statute, 4 Anne, c. 16, s. 16, no claim or entry, of or upon any lands, tenements, or hereditaments, shall be of force to avoid a fine levied with proclamations, unless upon such entry or claim, an action shall be commenced within one year next after the making of such entry or claim, and prosecuted with effect. It seems that if an actual entry be made to avoid a fine, and an ejectment brought within a year according to the statute of Anne, and the plaintiff recover in the ejectment, and have possession of the lands delivered to him by virtue of a writ of possession, the fine is totally avoided, and consequently if he be afterwards turned out of possession on a judgment recovered in an ejectment brought by the wrong doer, who levied the fine, and five years pass, he may nevertheless bring another ejectment without any other actual entry, at any time within twenty years after he was so turned out of possession; for the fine being once avoided, it shall be void for ever. (*f*)

Action within a year after entry.

Having shewn the requisites necessary to complete the title of the claimant in ejectment, it remains to point out the modes in which a person, having such title, may be barred of his remedy by ejectment, and those modes are principally three: 1st. By discontinuance. 2nd. By a descent cast; and 3rd. By operation of the statute of limitations, 21 Jac. 1, c. 16.

When title barred.

The nature and manner of creating a discontinuance have already been explained (*g*), and the cases in which an entry is tolled by a descent cast, have also been mentioned. (*h*) It will therefore only be necessary, in this place, to notice the effect of the statute of limitations in barring an entry.

(*a*) Co. Litt. 258, a. *Ante*, p. 80.
(*b*) See *ante*, p. 80.
(*c*) See *ante*, p. 80.
(*d*) *Ante*, p. 79.
(*e*) *Ante*, p. 85.
(*f*) Stowell v. Zouch, Plow. Com. 366. Wms. Note, 1 Saund. 319, g.
(*g*) *Ante*, p. 43 to p. 53.
(*h*) *Ante*, p. 81 to p. 85.

Title.

Barred by stat. of limitations.

The words of the statute of limitations, 21 Jac. 1, c. 16, which applies to writs of *formedon* as well as to rights of entry, have already been stated. (*a*)

There must be an adverse possession.

In order to bar the entry of a claimant into lands by the statute of limitations, it is necessary that there should have been an adverse possession or holding by another person for twenty years, but such possession will not be adverse where the party in possession has an interest or estate consistent with the interest or estate of the claimant, as where, 1. The possession of one is the possession of the other; 2. Where the estate of the party in possession and that of the claimant form different parts of one and the same estate; and 3. Where the relation of *cestui que trust* and trustee, or mortgagor and mortgagee, subsists between the parties.

1. Where the possession of the party in possession is the possession of the claimant. If a younger son enters by abatement on the death of his father, and dies seised, we have seen that such dying seised will not toll an entry (*b*), and the ground of this is, that the possession of the younger brother is the possession of the elder brother; even though the younger brother be only of the half blood; and such entry is said to make a *possessio fratris* to the exclusion of the younger brother himself who entered. (*c*) The possession of such younger son therefore, for upwards of twenty years, will not bar the ejectment of the eldest son.

So also the entry and possession of one coparcener, jointenant or tenant in common, are the entry and possession of the other parcener, jointenant or tenant in common; so as to prevent the operation of the statute of limitations. (*d*) But if there be *an actual ouster* of one parcener, &c. by his coparcener, &c. the statute will begin to run from the time of such actual ouster. What acts shall amount to an actual ouster has been a subject of some dispute. It does not require a turning out with real force (*e*), but a jury from other circumstances may presume an

(*a*) *Ante*, p. 13.

(*b*) *Ante*, p. 84.

(*c*) Litt. s. 396. Co. Litt. 242, a, b. Gilb. Ten. 28. Watk. on Desc. 53, Bull. N. P. 102.

(*d*) Ford v. Grey, 6 Mod. 44. 1 Salk. 285, S. C. Smales v. Dale, Hob. 120. Fishar v. Prosser, Cowp. 218. Fairclaim d. Empson v. Shackleton, 2 W. Bl. 690, but see Earl of Sussex v. Temple, 1 Ld. Raym. 312.

(*e*) Doe d. Fishar v. Prosser, Cowp. 218. Peaceable d. Hornblower v. Read, 1 East, 574.

Title.

Barred by stat. of limitations.

actual ouster. Thus where a tenant in common had been in the sole and uninterrupted possession of the premises for thirty-six years, without any account to or demand made or claim set up by his companion, it has held sufficient ground for a jury to presume an actual ouster (*a*); but where one tenant in common levied a fine, and took the rents and profits afterwards without account for nearly five years, it was held that there was no evidence from which a jury could presume (contrary to the justice of the case) an ouster of the other tenant in common. (*b*)

It is said by Sir Edward Coke, that if one parcener, &c. *enters*, claiming the whole, and takes the profits of the whole, this is a devesting of the estate of the other, and an actual ouster; but where the parceners are actually seised, the taking of the whole profits, *or* a claim made by the one, will not put the other out of possession. (*c*) But according to Lord Mansfield, if upon demand by the co-tenant of his moiety, the other denies to pay *and* denies his title, saying he claims the whole, and will not pay, and continues in possession, such possession is adverse and ouster enough (*d*); and in a late case it was held, that if one tenant in possession claims the whole, and denies possession to the other, this, being beyond the mere act of receiving the whole rent, which is equivocal, is evidence of an ouster (*e*); but a bare perception of the profits by one tenant in common for twenty-six years is no ouster. (*f*) Where there were two jointenants of a lease for years, and one of them bade the other go out, and he went out accordingly, this was held to be an actual ouster. (*g*) The confession of ouster in the consent rule is sufficient proof of actual ouster, in an ejectment brought by one tenant in common, &c. against another (*h*); and it is usual in such cases therefore to enter into a special rule confessing lease and entry only. (*i*)

(*a*) Doe d. Fishar v. Prosser, Cowp. 217.

(*b*) Peaceable d. Hornblower v. Read, 1 East, 568.

(*c*) Co. Litt. 373, b, 243, b, and see Vin. Ab. Jointenants (P. a). See the law well stated in the argument of Blackstone, Davenport v. Tyrrel, 1 W. Bl. 677.

(*d*) Fishar v. Prosser, Cowp. 218. Recognised in Peaceable v. Read, 1 East, 574.

(*e*) Doe d. Hellings v. Bird, 11 East, 49. Receipt of rent is no disseisin, Bul. N. P. 104, except at election, Litt. s. 589.

(*f*) Fairclaim d. Empson v. Shackleton, 5 Burr. 2604, but see Cowp. 220.

(*g*) Beverley's case, Clayt. 111, but see *anon. ibid.* 121, *contra*. Vin. Ab. Jointenants (P. a).

(*h*) Oates d. Wigfall v. Brydon, 3 Burr. 1895. Doe d. White v. Cuffs, 1 Camp. N. P. C. 173.

(*i*) See *post*.

Title.

Barred by stat. of limitations.

2. Where the estate of the party in possession and that of the claimant form different parts of one and the same estate, the possession of the former will not be adverse, so as to bar the latter by the statute of limitations. The possession of the particular tenant is never adverse to the title of him in remainder or reversion. (*a*) Thus where by a marriage settlement a copyhold estate of the wife was limited to the survivor of husband and wife in fee, but no surrender was made to the use of the settlement, and after the wife's death the husband was admitted to the lands, pursuant to the equitable title acquired by the settlement; it was held that if he had had no other title than the admission, a possession by him for twenty years would have barred the heir at law of the wife; but as it appeared that there was a custom in the manor, for the husband to hold the lands for his life, in the nature of a tenancy by the curtesy, the possession of the copyhold by the husband was referred to this title, and not to the admission under the settlement; and such possession being consistent with the title of the heir at law (the tenancy by the curtesy, and the reversion in the heir, forming parts of one and the same estate,) the latter was allowed to maintain ejectment against the devisee of the husband, within twenty years after the husband's death, though more than twenty years from the first possession of the husband. (*b*)

3. Where the relation of trustee and *cestui que trust* subsists between the parties, the possession of the latter for more than twenty years will be no bar to the entry of the former. (*c*) But although the statute cannot in general, as between those parties, operate as a bar, yet the trustee may in some cases be barred by the possession of the *cestui que trust*, or those claiming under him. (*d*) When a *cestui que trust* sells or devises the estate, and the vendee or devisee obtains possession of the title deeds, and enters, and does no act recognising the trustee's title, there is great reason to contend that this is a disseisin of the trustee,

(*a*) Taylor d. Atkins v. Horde, 1 Burr. 60. Doe d. Fishar v. Prosser, Cowp. 218.

(*b*) Doe d. Milner v. Brightwen, 10 East, 583. Where the relation of landlord and tenant can be implied, the statute will not run. See Roe d. Pellat v. Ferrars, 2 Bos. and Pul. 542, or where the party in possession is tenant at sufferance, Doe d. Souter v. Hull, 2 Dowl. and Ryl. 38.

(*c*) Keene d. Ld. Byron v. Deardon, 8 East, 248. Smith v. King, 16 East, 283. Earl of Pomfret v. Lord Windsor, 2 Ves. 472.

(*d*) See Lord Portsmouth v. Lord Effingham, 1 Ves. 430. Harmood v. Oglander, 6 Ves. jun. 199. 8 Ves. jun. 106. Sugd. Vend. and Purch. 337, 6th edit.

Title.

Barred by stat. of limitations.

and consequently that the statute will operate from the time of such entry. (*a*)

Where interest has been paid upon a mortgage, it will prevent the statute from running against the mortgagee, though he has been out of possession for upwards of twenty years (*b*), for the payment of interest is conclusive evidence of a continuing tenancy between the mortgagor and mortgagee (*c*); and where premises were mortgaged in fee, with a proviso for reconveyance, if the principal were not paid on a given day, and in the meantime, that the mortgagor should continue in possession, and upon a special verdict it was found that the principal was not paid on the given day, but that the mortgagor continued in possession, and there was no finding by the jury, either that interest had or had not been paid by the mortgagor; it was held that upon this finding it must be taken that the occupation was by the permission of the mortgagee, and consequently, that although more than twenty years had elapsed since default in payment of the money, the mortgagee was not barred by the statute of limitations. (*d*)

Whether the statute of limitations will run against the reversioner upon the adverse possession gained by a disseisor who has entered and ousted the tenant for years, and disseised the reversioner, or whether the reversioner may enter within twenty years after the expiration of the term, is a point which does not appear to have been decided. (*e*) In a late case, where a copyholder, with the licence of the lord, leased his copyhold premises for sixty-one years, subject to a proviso for re-entry in case of non-payment of rent, and devised the lands and died, twenty years of the lease being then unexpired, and the heir at law was admitted, and received the rent from the death of the copyholder, until the expiration of the lease, it was held that the devisee was not barred of his entry by the statute of limitations, although more than twenty years had elapsed from the time of the death

(*a*) Sugd. Vend. and P. 337, 6th edit.

(*b*) Hatcher v. Fineux, 1 Ld. Raym. 740. Cholmondeley v. Clinton, 2 Jac. and Walk. 190, and see Smartle v. Williams, 1 Salk. 245.

(*c*) *Per* Abbott, C. J. Hall v. Doe, 5 B. and A. 690.

(*d*) *Ibid.* 1 D. and R. 340, S.C. As to occupation for more than twenty years by the *mortgagee*, see Cholmondeley v. Clinton, 2 Jac. and Walk. 187.

(*e*) See *ante*, p. 498, as to the reversioner entering to avoid a fine in such case.

Title.

Barred by stat. of limitations.

of the testator, and forfeiture of the lease by non-payment of the rent. (*a*) It having been argued that the land was freehold, the counsel for the defendant contended that the lessor of the plaintiff was barred by his laches, and that it was no answer to say that the outstanding lease prevented his entry before, for that it was still competent for him to have entered without committing a trespass, as to demand rent or fealty, or to obtain seisin of the freehold, upon which Mr. Justice Lawrence observed, "must not an entry to avoid the statute of limitations be an entry for the purpose of taking possession, and how could the lessor have lawfully entered for that purpose during the continuance of the lease?" and Lord Ellenborough also remarked, "can you shew that the devisee could have entered to vest the seisin in herself, without committing a trespass on the tenant in possession; because the law does not require a person to do that which would make him a wrong doer." As the lessee was not put out of possession, and the wrongful act of receiving rent does not operate as a disseisin (*b*), this case cannot be considered as a decision in point, but from the expressions of Lord Ellenborough and Mr. Justice Lawrence, it may be gathered that the inclination of their opinion was in favour of allowing the lessor to enter on the expiration of the term, although there had been a tortious possession during the continuance of the term, for upwards of twenty years. It is true, that where a man cannot enter, as where his entry has been prevented by a discontinuance, the statute does not operate (*c*), but in the present case, the reversioner might, as it seems, lawfully enter upon the land for the purpose of revesting the freehold. "If tenant for years," says Sir Edward Coke, "be ousted and he in reversion disseised, he in reversion may enter, to the intent to make his claim, and yet his entry as to take any profits is not lawful during the term." (*d*) So the reversioner may enter to avoid a fine. (*e*) However, as the statute 4 Anne, c. 16, s. 16, enacts, that no claim or entry shall be sufficient within the statute 21 Jac. 1, c. 16, unless upon such entry or claim an action shall be commenced within one year, and as the reversioner cannot maintain

(*a*) Doe d. Cook v. Danvers, 7 East, 299.

(*b*) Except at election, Litt. s. 588, 589.

(*c*) See Hunt v. Bourne, Salk. 339, 422.

(*d*) Co. Litt. 250, b. Hemming v. Brabazon, Bridgm. 16.

(*e*) Margaret Podger's case, 9 Rep. 106, a. *Ante*, p. 80.

Title.

Barred by stat. of limitations.

ejectment, it would seem that the entry of the reversioner during the term would be nugatory, and it might perhaps on that account be contended, that as his right of entry, to any efficient purpose, first accrues to him on the expiration of the term, the statute ought not to be allowed to operate during the continuance of the term. It should however be recollected, that it is competent to the reversioner to revest the freehold during the continuance of the term by bringing a real action.

It appears not to be decided whether twenty years possession of premises, which a tenant has gained by encroachment on the lord's waste, will be a bar in an ejectment brought for such premises by the lessor after the expiration of the tenancy. Perryn, B., and Heath and Buller, Justices, are said to have ruled that the lessor was entitled to recover (*a*), and Graham, B. ruled the same way (*b*); while Lord Kenyon has laid it down as clear law, that if a tenant inclose part of a waste, and is in possession thereof, so long as to acquire a possessory right to it, such inclosure does not belong to the landlord; but if the tenant has acknowledged that he held such inclosed part of his landlord, this would make a difference. (*c*) Thompson, B. also inclined to the same opinion, but refused to nonsuit the landlord, out of deference to the authorities cited for the plaintiff. (*d*) With regard to the lord of the waste, twenty years undisturbed possession of the land encroached will be a bar to him. Thus if a cottage has been built in defiance of the lord, and quiet possession has been had of it for twenty years, it is within the statute; but if it were built at first with the lord's permission, or any acknowledgment has been made since, the statute will not run against the lord (*e*); as where the defendant had enclosed a small piece of waste land by the side of a public highway, and had occupied it for thirty years without paying any rent, but at the expiration of that time the owner of the adjoining land demanded 6*d.* rent, which the defendant paid on three several occasions, it was held that these payments in the absence of other evidence were conclusive to shew that the occupation of the defendant began by

(*a*) See Doe d. Challnor v. Davies, 1 Esp. N. P. C. 461.

(*b*) Bryan d. Child v. Winwood, 1 Taunt. 208.

(*c*) Doe d. Colclough v. Mullinor, 1 Esp. N. P. C. 460.

(*d*) Doe d. Challnor v. Davies, 1 Esp. N. P. C. 461. And see Attorney Gen. v. Fullerton, 2 Ves. and Beam. 263.

(*e*) Bull. N. P. 104. Creach v. Wilmot, 2 Taunt. 160, (n).

Title.

permission, and that the owner of the adjoining land was entitled to recover in ejectment. (*a*)

Barred by stat. of limitations.

With regard to the construction of the saving clause, in the statute of 21 Jac. 1, c. 16, it is settled that it only extends to the persons in whom the right *first* descends, and that when the statute has once begun to run, no subsequent disability will stop its operation; and there is no distinction between voluntary and involuntary disabilities. (*b*)

Saving clause.

It has been held by Lord Ellenborough, C. J. and Lawrence, J. that the word *death*, in the saving clause of this statute, refers to the death of the person to whom the right first accrued and who died under disability, and that the heir must enter within ten years from that time, though under a disability (*c*); but in a late case the court was of opinion that the heir has ten years after his own disability ceases, and not merely from the death of the ancestor dying under disability (*d*), which is said to be the construction invariably adopted in practice. (*e*)

If an estate descends to parceners, one of whom is under a disability, which continues more than twenty years, and the other does not enter within twenty years, the disability *of* the one does not preserve the title of the other, after the twenty years elapsed. (*f*)

It seems that where no account can be given of a person within the exceptions in the act, he will be presumed to be dead at the expiration of seven years from the last account of him. (*g*)

It has been doubted whether an actual entry is not required to prevent the operation of the statute of limitations (*h*); but it seems clear that no such entry is necessary. (*i*) Though if the twenty years limited by the statute are near their expiration, it may be prudent to make an actual entry into the lands, in which case ejectment should be brought within one year from the time of such entry according to the statute 4 Anne, c. 16, s. 16.

(*a*) Doe d. Jackson v. Wilkinson, 3 B. and C. 413.

(*b*) Doe d. Duroure v. Jones, 4 T. R. 310, and see Sturt v. Mellish, 2 Atk. 610, 614.

(*c*) Doe d. George v. Jesson, 6 East, 80. *Ante*, p. 14.

(*d*) Cotterell v. Dutton, 4 Taunt. 826. *Ante*, p. 14.

(*e*) Sugd. Vend. and P. 334, 6th edit.

(*f*) Doe d. Langdon v. Rowlston, 2 Taunt. 441.

(*g*) Doe d. George v. Jesson, 6 East, 84, *vide post*.

(*h*) Goodright d. Hare v. Cator, Dougl. 477, 485, (n).

(*i*) 1 Saund. 319, e, note, 5th edit.

Title.

Of particular persons.

Assignees of Bankrupts. *Freeholds.*

The bargain and sale from the commissioners to the assignees, operates to convey all the freeholds of which the bankrupt is possessed at the time of executing the deed; but freeholds acquired by the bankrupt, after the execution of the bargain and sale, will not pass by that deed, but a new bargain and sale is necessary to vest them in the assignees. (*a*) The bargain and sale must be enrolled; but in the statute 13 Eliz. c. 7, s. 13, no time is limited for the enrolment, though by the 21 Jac. 1, c. 19, s. 12, the bargain and sale of the entailed estates of the bankrupt must be enrolled within six months. It has been held, that ejectment cannot be maintained on a demise by the assignees before enrolment, though the deed was enrolled after action brought. (*b*) Nor is there any relation of the conveyance of the freehold property to the time of the act of bankruptcy; and, therefore, where the demise was laid after the date of the commission, but before the bargain and sale to the assignees, (the lessors of the plaintiff,) it was held that the plaintiff was not entitled to recover. (*c*)

Copyholds.

The copyhold estates of the bankrupt are expressly named in the statute 13 Eliz. c. 7, s. 3, and pass by the bargain and sale from the commissioners; but the bargainee cannot maintain ejectment before admittance; though after admittance, his title will have reference to the bargain and sale. (*d*)

The assignment of the commissioners vests all the personal property of the bankrupt, and consequently all terms of years to which he may be entitled, in the assignees, by relation to the act of bankruptcy (*e*); and his after acquired personal estate will pass to the assignees under that deed, without any new assignment. (*f*) The assignees therefore may recover a term of years in ejectment, on a demise laid at any time after the act of bankruptcy.

Assignees of Reversions.

At common law, the assignee of a reversion could not take advantage of a condition of re-entry annexed to a particular

(*a*) *Ex parte* Proudfoot, 1 Atk. 252. 1 Cooke's B. L. 278. Real property out of England does not pass. Selkreg v. Davis, 2 Rose, 291.

(*b*) Perry v. Bowers, T. Jones, 196. 1 Vent. 360. 2 Shower, 156, S. C. Com. Dig. Bankrupt, (D. 23). 1 Cooke's Bankrupt Law, 278. Bennet v. Gandey, 1 Shower, 206.

(*c*) Doe d. Esdaile v. Mitchell, 2 M. and S. 446.

(*d*) Parker v. Bleeke, Cro. Car, 568. *Post*, p. 512.

(*e*) Case of Bankrupts, 2 Rep. 26, a.

(*f*) *Ex parte* Proudfoot, 1 Atk. 253.

Title.

Of particular persons.

Assignees of reversions.

At common law.

estate (*a*); though he might take advantage of a condition in law, as where a lessee for life committed forfeiture. (*b*) So if a limitation was annexed to an estate, the grantee of the reversion might take advantage of it, for the estate determines without entry. (*c*) So also it was held, that where an estate was made to cease without entry, on a condition broken, as where a lease *for years* was made upon condition *to be void*, if a certain act was done, by the breach of the condition, the term was absolutely determined, and the assignee of the reversion might take advantage of the condition. (*d*) And now, by statute 32 Hen. 8, c. 34, the assignee of a reversion may take advantage of a condition in fact, as well as in law, for by that statute assignees and grantees of reversions, have the like advantage against lessees, &c. by entry, as the lessors themselves had. This statute does not relate to reversions upon estates tail. (*e*)

What persons within stat. 32 *H.* 8, *c.* 34.

With regard to the persons who are considered assignees within the statute, so as to take advantage of a condition of re-entry, it has been determined, that persons who come in merely by act of law, as the lord by escheat, or in mortmain, are not within the statute (*f*); but the grantee of the reversion by bargain and sale, though he is *in* by the statute of uses, is an assignee to take advantage of a condition. (*g*) And where A. seised of lands in fee, devises them to B. for years, rendering rent, with a clause of re-entry, and by the same will devises the reversion to C., C. shall take advantage of the condition, though it was not a reversion in the testator. (*h*) The grantee of part of the reversion, as a grantee for life or years of a reversion in fee, is an assignee within the statute (*i*); but the assignee of the reversion in part of the lands, cannot take advantage of a condi-

(*a*) Co. Litt. 215, a. Shep. Touch. 150, 151. Com. Dig. Condition, (O. 1). 1 Saund. 288, b, note, 5th edit.

(*b*) Co. Litt. 215, a, but the grantee of a reversion cannot take advantage of a forfeiture in the time of the grantor. Fenn d. Matthew v. Smart, 12 East, 444.

(*c*) Co. Litt. 214, b.

(*d*) *Ib.* Com. Dig. *ubi sup.*; but in Doe d. Bryan v. Ranoke, 4 B. and A. 401, it was held, that such a lease was only voidable at the option of the lessor; and see Prest. Shep. Touch. 151.

(*e*) Co. Litt. 215, a.

(*f*) Co. Litt. 215, b. Com. Dig. Condition, (O. 2). *Ante*, p. 445.

(*g*) Co. Litt. 215, a. Com. Dig. *ubi sup.* *Ante*, p. 445.

(*h*) Machel & Duntun's case, 2 Leon. 33. Com. Dig. *ubi sup.*

(*i*) Co. Litt. 215, a. Com. Dig. Condition, (O. 2). 1 Saund. 288, b (*a*), 5th edit.

Title.

Of particular persons.

tion (*a*); for a condition is entire, and cannot be apportioned, unless by act of law, as where a man makes a lease of two acres, one of the nature of Borough English, the other at common law, upon condition, and dies, leaving two sons, each of them may enter for the condition broken. (*b*) The assignee must have the same estate, or a portion of the same estate which was in his grantor; and, therefore, if the reversion to which the condition is incident, is merged in the reversion in fee, the owner of the latter estate cannot take advantage of the condition as assignee. (*c*)

What conditions are within the statute.

The assignee of a reversion cannot take advantage of every condition, but only of such conditions as are either incident to the reversion, as for payment of rent, or for the benefit of the estate, as the not doing of waste, for keeping houses in repair, for making fences, scouring ditches, preserving woods, and the like; and not for the payment of a sum of money in gross, &c. (*d*)

Notice of assignment.

The grantee, or assignee of a reversion, cannot take advantage of a condition of re-entry for non-payment of rent, before notice to the lessee of the grant or assignment. (*e*)

Conusee of stat. merchant, and staple, and tenant by *elegit*.

A conusee of a statute merchant, or statute staple, may maintain ejectment; but the conusee of a statute staple, cannot bring ejectment before the sheriff has executed the writ of *liberate*. (*f*)

In order to obtain actual possession under an *elegit*, the tenant by *elegit* must, it is said, bring ejectment, the sheriff being only entitled to give *legal*, and not actual possession under that writ. (*g*) It seems, however, that the party may enter without resorting to an ejectment. (*h*)

After the execution satisfied.

In case of an *elegit* upon a judgment, or recognisance at common law, when the tenant by *elegit* has received payment of his debt out of the usual and ordinary profits of the land, the de-

(*a*) Co. Litt. 215, a. Com. Dig. *ubi sup.* Knight's case, 5 Rep. 55, b. *contra* as to covenant. *Ante*, p. 445.

(*b*) *Ibid.* Dyer, 309, a.

(*c*) Moor, 94. Webb v. Russell, 3 T. R. 402.

(*d*) Co. Litt. 215, b. Shep. Touch. 153. Com. Dig. Condition, (O. 2). As to what covenants run with the land, see *ante*, p. 435 *et seq.*

(*e*) Co. Litt. 215, b. Frances's case, 8 Rep. 92, a. Birch v. Wright, 1 T. R. 385. Com. Dig. Condition, (L. 8), (O. 2). *Contra* as to Covenant, *ante*, p. 452.

(*f*) Anon. 1 Vent. 41. Tidd's Pr. 1136, 8th edit.

(*g*) Lowthal v. Tomkins, 2 Eq. Ca. Ab. 381. *Per* Kenyon, C. J. Taylor v. Cole, 3 T. R. 295.

(*h*) *Per* Gibbs, C. J. Rogers v. Pitcher, 6 Taunt. 207. 1 Marsh. 543, S. C.

Title.

Of particular persons.

fendant or conusor, may enter or bring ejectment, without a *scire facias*, but when land is extended on a statute merchant, statute staple, or recognisance in the nature of a statute staple, the conusor cannot enter though the conusee has received the whole debt, damages and costs, but must sue out a *scire facias ad computandum et rehabendam terram.* (*a*)

Copyholder.

Although a copyholder must in general sue in the lord's court, by plaint, yet his lessee has a warrantable estate by the rules of the common law, and may, therefore, maintain ejectment in the king's courts. (*b*) According to several old cases, a copyholder could not maintain ejectment on a demise for more than one year, unless such demise were shewn to be by licence of the lord (*c*); but by the modern practice, the common consent rule is sufficient evidence of the lease. (*d*)

Heir.

The heir of a copyholder may maintain ejectment against a stranger before admittance (*e*); and he need not tender himself to be admitted at the lord's court, if the steward has refused to admit him. (*f*)

Grantee of the lord.

The grantee of the reversion of a copyhold from the lord, has a good and perfect title by the grant, and may maintain ejectment without admittance. (*g*)

Surrenderee.

The title of a surrenderee is not complete until admittance, and therefore, before that time, he can neither enter nor maintain ejectment. (*h*) But after admission, his title has relation to the time of the surrender against all persons but the lord; and, therefore, a surrenderee may recover in ejectment against his surrenderor, or a stranger, upon a demise laid between the time of the surrender and admittance, provided he be admitted before trial. (*i*) Where the devisee of a copyhold estate dies before admittance, his devisee, though afterwards admitted, cannot recover in ejectment, for the legal estate is in

(*a*) 2 Saund. 72, u, note.

(*b*) Coke Copyh. s. 51.

(*c*) See the cases collected Gilb. Ten. 214, 215, and Mr. Watkins's note, xcii.

(*d*) Doe d. Shore v. Porter, 3 T. R. 17.

(*e*) Rummey v. Eves, 1 Leon. 100. 4 Rep. 23, b. Doe d. Tarrant v. Hellier, 5 T. R. 169. Roe d. Jefferys v. Hicks, 2 Wils. 13.

(*f*) Doe d. Burrell v. Bellamy, 2 M. and S. 87. It is now held, that a *mandamus* will lie to admit the heir, R. v. Brewers' Comp. 3 B. and C. 172.

(*g*) Doe d. Cosh v. Loveless, 2 B. and A. 453.

(*h*) Co. Copyh. s. 39. Berry v. Greene, Cro. Eliz. 349.

(*i*) Holdfast d. Woollams v. Clapham, 1 T. R. 600. Doe d. Bennington v. Hall, 16 East, 208.

Title.

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the heir of the first testator. (*a*) The admittance of tenant for life is the admittance of him in remainder (*b*); and, therefore, on the death of tenant for life, the remainderman may bring ejectment, and lay the demise at any time after the death of tenant for life.

Widow for her free-bench.

Where the widow takes the whole of the lands as her free-bench, she may enter immediately into them, and may consequently maintain ejectment before admittance, for the law casts the possession on her, as it does on the heir in cases of descent. But when the widow takes a portion only of the lands, it should seem, that the possession is not cast upon her any more than at common law; and, consequently, that she will not be warranted in entering without assignment. It should seem also, that the regular mode for her to obtain assignment, is by plaint in the lord's court. (*c*)

Coparcener, jointenant, and tenant in common.

As the possession of one coparcener, jointenant, or tenant in common, is the possession of the other or others (*d*), an ejectment cannot be maintained by one of them against the other, unless an actual ouster has taken place. (*e*) The acts which amount to an actual ouster have been already stated. (*f*)

Corporation.

A corporation, either aggregate or sole, may make a lease to try a title in ejectment. (*g*) Thus the king may recover in this action (*h*); but in cases within the statutes, 8 H. 6, c. 16, and 18 H. 6, c. 6, which prohibit the granting to farm of lands seised into the king's hands, upon inquest before escheators, until such inquest be returned in the chancery or exchequer, and for a month afterwards, if the king's title be not found of record, no ejectment will lie on the demise of the crown before office found. (*i*)

(*a*) Doe d. Vernon v. Vernon, 7 East, 8.

(*b*) Auncelme v. Auncelme, Cro. Jac. 31. 1 Watk. Copyh. 196.

(*c*) 2 Watk. Copyh. 89, 1, 247. notes to Gilb. Ten. xxv. p. 373. See Howard v. Bartlet, Hob. 181. Jurden v. Stone, Hutt. 18. Vaughan d. Atkins v. Atkins, 5 Burr. 2787. Chapman v. Sharp, 2 Shower, 184. Kitch. 103, b.

(*d*) *Ante*, p. 502.

(*e*) *Anon.* 7 Mod. 39. Johnson v. Allen, 12 Mod. 657. *Ante*, p. 502. The defendant may enter into a special rule confessing lease and entry only, *post*.

(*f*) *Ante*, p. 503.

(*g*) St. John's College v. Norris, 1 Buls. 119. 1 Anderson, 248. Dyer, 86, a. margin. 1 Kyd on Corp. 187.

(*h*) Lee v. Norris, Cro. Eliz. 331.

(*i*) Doe d. Hayne v. Redferne, 13 East, 96.

Title.

Of particular persons.

Where overseers of the poor, who before the statute, 59 G. 3, c. 12, were not a corporation so as to take lands in succession, brought ejectment on their own demise against a tenant, who came in under their predecessors, and who had done no act to recognise his holding under the lessors of the plaintiff, it was held that they were not entitled to recover. (*a*)

Devisee and legatee.

The devisee of a freehold interest has the freehold in law cast upon him immediately upon the death of the devisor, and may consequently enter or maintain ejectment (*b*), but the legatee of a term of years must first obtain the assent of the executor (*c*), though by such assent the term is vested in the legatee from the death of the testator. (*d*) A very small matter shall amount to an assent to a legacy, an assent being a rightful act. (*e*)

Grantee of a rent charge.

The grantee of a rent-charge, with a proviso, that if the rent be in arrear he may enter, and retain until satisfied, may maintain ejectment on the rent becoming in arrear (*f*), but such a right of entry is always construed strictly. (*g*)

Guardian.

A guardian in socage, or testamentary guardian, appointed pursuant to statute, 12 Car. 2, c. 24, s. 8, may bring ejectment for the lands in ward. (*h*) A guardian by nurture has only the custody and government of the infant's person (*i*), and therefore cannot make a lease of the infant's lands so as to support an action of ejectment. In ejectment by a guardian in socage it seems that the demise should be laid at a time when the ward was under the age of fourteen. (*k*)

(*a*) Doe d. Grundy v. Clarke, 14 East, 488. See Doe d. Churchwardens and Overseers of Orleton v. Harpur, 2 Dowl. and Ryl. 708.

(*b*) Co. Litt. 111, a. 240, b. Com. Dig. Administration, (C. 5).

(*c*) Co. Litt. 111, a. Com. Dig. *ubi sup.* Young v. Holmes, 1 Str. 70. 1 Saund. 279, d. (n,) 5th edition.

(*d*) Westwick v. Wyer, 4 Rep. 28, b. Saunders's case, 5 Rep. 12, b. Doe d. Ld. Say and Sele v. Guy, 3 East, 120.

(*e*) *Per* Ld. Chancellor in Noel v. Robinson, 1 Vern. 94.

(*f*) Jemott v. Cowley, 1 Saund. 112. 1 Lev. 170, S. C. Gilb. Rents, 139. See Fearne, Cont. Rem. 528.

(*g*) Hassell d. Hodson v. Gouthwaite, Willes, 500. Co. Litt. 203, a, note 3.

(*h*) Shoplane v. Roydler, Cro. Jac. 98. Wade v. Cole, 1 Ld. Raym. 131. Bedell v. Constable, Vaugh. 179. Roe d. Parry v. Hodgson, 2 Wils. 129.

(*i*) Hargrave's note, Co. Litt. 88, b. (13).

(*k*) Litt. s. 123. Doe d. Rigge v. Bell, 5 T. R. 471. 2 Phill. Evid. 250, 6th edit.

Title.

An infant may make a lease to try his title in ejectment. (*a*)

Of particular persons.

Lunatic.

The committee of a lunatic is only a bailiff, and has no interest in the land; an ejectment therefore for such lands must be brought on the demise of the lunatic himself. (*b*)

Landlord.

On the ceasing of the relation of landlord and tenant, the former may maintain an ejectment for the recovery of the premises demised. An ejectment may therefore be brought, 1. On the *expiration* of the tenancy either by effluxion of time, or the happening of a particular event. 2. On the *determination* of the tenancy by notice to quit; and thirdly, on the ceasing of the tenancy by forfeiture.

1. The expiration of the tenancy by effluxion of time, or the happening of a particular event (*c*), will depend on the stipulations of the lease.

2. With regard to an ejectment, brought on the determination of the tenancy by a notice to quit, it is necessary to inquire: 1st. In what cases an express or implied tenancy is created, so as to require a notice to quit. 2nd. At what time the notice must be given. 3rd. By whom. 4th. To whom. 5th. Its form. 6th. The service; and 7th. The waiver of notice.

1. In what cases notice to quit is necessary.

Where a lease is made for a definite term, the tenancy will expire with the term, and no notice to quit is necessary. (*d*) But in the case of a tenancy from year to year, the relation of landlord and tenant must be determined by a notice to quit. (*e*)

A demise, "not for one year only, but from year to year," has been held to constitute a tenancy for two years at least, not determinable by a notice to quit at the expiration of the first year (*f*); and so a demise "for a year, and afterwards from year to year," is a demise for two years (*g*), but where the demise was "for twelve months certain, and six months notice afterwards," Lord Ellenborough held that the tenant was at liberty to quit

(*a*) Zouch v. Parsons, 3 Burr. 1794, 1806. Maddon d. Baker v. White, 2 T. R. 159.

(*b*) Drury v. Fitch, Hutt. 16. Cocks v. Darson, Hob. 215. Knipe v. Palmer, 2 Wils. 130. See 43 G. 3, c. 75, as to leases by the committee.

(*c*) See Doe d. Waithman v. Miles, 1 Stark. N. P. C. 181. 4 Campb. N. P. C. 373, S. C.

(*d*) Cobb. v. Stokes, 8 East, 358.

(*e*) Layton v. Field, 3 Salk. 222. Right d. Flower v. Darby, 1 T. R. 159, 163.

(*f*) Denn d. Jacklin v. Cartwright, 4 East, 31.

(*g*) Birch v. Wright, 1 T. R. 380.

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at the end of twelve months, giving six months previous notice. (*a*)

Where the lease is to hold for three, six, or nine years, generally, without any stipulation as to the manner in which, or the party by whom the tenancy may be determined at the end of the third or sixth year, the tenancy is only determinable at those two periods, at the option of the lessee. (*b*)

The necessity and effect of a notice to quit frequently depend upon the construction of instruments which bear the form of agreements for a lease, but which in fact operate as leases. It will therefore be necessary to state the decisions upon this subject, which, it has been observed, run upon very nice distinctions. The cases in which the instrument has been considered a lease will be first stated; and afterwards those in which it has been held to be merely an agreement for a lease.

Instruments held to be leases.

In an anonymous case in Moor (*c*), it was held, that if a man says, "I will that you shall have a lease for twenty-one years in my land, paying 10*s.* yearly rent; make a lease in writing, and I will seal it," this is a perfect lease by the words.

In Harrington v. Wise (*d*), the instrument was in the following words: "It is covenanted and agreed between the parties, that J. H. doth let the said lands for and during five years, to begin at the feast of St. Michael next following, provided that the said W. shall pay to the said J. H. annually, during the term at, &c., 120*l.* Also, the said parties do covenant, that a lease shall be made and sealed, according to the effect of these articles, before the feast of All Saints, next ensuing." These words were held to make a good lease.

In Tisdale v. Sir William Essex (*e*), a covenant, that T. should have, occupy, and enjoy certain lands, for seven years, from a future day, and that the covenantor would make him as good and perfect a demise of the premises, or security for the quiet enjoying of it, as his counsel should think fit, was adjudged to operate as a lease of the land.

(*a*) Thompson v. Maberley, 2 Campb. N. P. C. 573. Whether the nature of the ground, or the course of husbandry, can be held to regulate the duration of a tenancy, see 2 Wm. Bl. 1171.

(*b*) Dann v. Spurrier, 3 Bos. and Pul. 399, 442. Doe d. Webb v. Dixon, 9 East, 15; and see Colton v. Lingham, 1 Stark. N. P. C. 39.

(*c*) *Anon.* Moor, 8, cited in Maldon's case, Cro. Eliz. 33.

(*d*) Cro. Eliz. 486. 1 Rol. Ab. 847, l. 46. Noy, 57, S. C.

(*e*) Hob. 34; and see Drake v. Monday, Sir W. Jones, 231. Cro. Car. 307, S. C. 5 T. R. 167.

Title.

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In Baxter d. Abrahall v. Browne (*a*), J. A. and P. L. entered into an agreement, "with all convenient speed, to grant a lease to B. of, and they did thereby set and let to him, all that, &c." To hold for twenty-one years from Candlemas then next, at the rent of 290*l.* per annum, payable half yearly to the lessors. Provided that the said lease shall be void on nonpayment of rent, alienation, &c.; and that such lease shall contain usual covenants on the part of the lessors and lessee, and certain special ones therein mentioned, in one of which the words *this demise* occur. This was held to be clearly a good lease *in præsenti.*

In Weakly d. Yea v. Bucknell (*b*), A. by an agreement in writing, articled with B. to grant a lease to him for twenty-one years from Lady-day, 1758, at the yearly rent of 220*l.* No lease was ever tendered or demanded. Lord Mansfield held the production of this instrument a sufficient defence in ejectment, notwithstanding a notice to quit expiring before the end of the twenty-one years.

In the case of Barry v. Nugent (*c*), the instrument ran in the following form: "Be it remenbered, that J. B. hath let, and by these presents, doth demise, &c., unto R. T. &c., for twenty-one years, to commence the 5th May, or 1st November, whichever first happens after the said J. B. recovers the said lands from M. O. The said R. T. covenanting and agreeing on the foregoing conditions, to pay to J. B. 100*l.* yearly, and every year during the said term, &c., leases with power of distress, and clauses for re-entering, and all other clauses usual between landlord and tenant, to be drawn and signed at the request of either party, as soon as J. B. recovers the said lands from M. O. &c." The court was clearly of opinion, that these articles operated as a present demise.

In Poole v. Bentley (*d*), a memorandum was produced in the following words: "Memorandum of an agreement this 12th June, 1806, between J. P. and P. B. The said J. P. hereby agrees to let to the said P. B., and the said P. B. agrees to take of the said J. P. all that piece of land, &c., for the term of sixty-one years from Lady-day next, at the yearly rent of 120*l.* free and clear of all taxes, &c., the said rent to be paid quarterly, the first quarter's rent within fifteen days after Michaelmas,

(*a*) 2 W. Bl. 973.

(*b*) Cowp. 473.

(*c*) Error from K. B. in Ireland, cited 5 T. R. 165. See observations on this case, in 15 East, 246. 5 T. R. 167.

(*d*) 12 East, 168. See observations on this case in 13 East, 19.

Title.

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1807. And that for, and in consideration of a lease to be granted by the said J. P. for the said term of years, the said P. B. agrees, within the space of four years from the date hereof, to expend and lay out in five or more houses, of a third rate, or class of building, 2,000*l.*, and the said J. P. agrees to grant a lease or leases of the said land or premises, as soon as the said five houses are covered in, and the said P. B. agrees to take such lease or leases, and to execute a counterpart or counterparts thereof. This agreement to be considered binding until one fully prepared can be produced." This instrument was held to be a lease.

In Doe d. Walker v. Groves (*a*), the instrument ran in these words: "Agreement made this 7th day of March, 1798, between T. Walker of the one part, and E. Groves of the other. The said T. Walker doth hereby agree to let, and also upon demand, to execute unto the said E. Groves, a lease of the farm-house, farm-stead, and farm, situate, &c., as the same is now in the occupation of the said T. Walker. And the said E. Groves doth hereby agree to take, and upon demand to execute, a counterpart of a lease of the said farm, to hold the same from the 5th of April, 1798, for the term of fifteen years, under the yearly rent of 147*l.* to be paid half yearly on the 5th of April and 10th of October, which said lease is to contain the usual covenants, and an agreement for re-entry in case of non-payment of the rent, or non-performance of covenants, and also the further covenants, &c. That this agreement shall be binding until the said lease is made and executed; and lastly, that the said T. Walker shall this present season properly cultivate, and at his own expense, sow down ten acres of tillage land, with not less than ten quarters of hay seeds, and ten stone of small seeds." It was held, that this instrument amounted to a lease.

Instruments held to be agreements for leases.

In the early case of Sturgeon v. Painter (*b*), certain articles were drawn up between A. and S. viz. "*Imprimis*, A. doth demise her close to S. to have it for forty years, and a rent reserved with a clause of distress, &c. In witness, &c." And a memorandum was afterwards written on the same paper, "that these articles are to be ordered of counsel by both parties according to the due form of law." It was ruled, that these articles were not a sufficient lease.

(*a*) 15 East, 244.

(*b*) Noy, 128; recognised in Goodtitle v. Way, 1 T. R. 736.

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In another early case, Burghes v. Bowman (*a*), the agreement was to take a house for the yearly rent of 50*l.* and the lessor to repair. A lease to be drawn by St. Thomas's day, and the lease then to begin. This was held to be an agreement and not a lease.

In Goodtitle d. Estwick v. Way (*b*), the portion of the instrument which related to the demise, ran in the following terms: "And further, the said Earl of Abingdon doth hereby agree to let, and the said Richard Way agrees to rent, and take for the term of seven, fourteen, or twenty-one years, in case the said earl shall so long live, at and for the rent of 1,400*l.* a year, to be paid half yearly, (the said earl to pay and allow all manner of tithes, &c.) all his estate, &c., at Rycot. It is agreed, that the said Richard Way shall enter upon all the said premises immediately, but not commence payment of rent until Lady-day next. It is further agreed, that leases with the usual covenants shall be made and executed by the parties on or before Michaelmas next." The court were of opinion, that this was not a lease.

In the case of Doe d. Coore v. Clare (*c*), the agreement was written upon paper, stamped with an agreement stamp, and ran as follows: "Be it remembered, that it is agreed, this 4th of October, 1786, between Thomas Tidd of the one part, and Thomas Clare of, &c. of the other part; whereas Mary Statham, widow, is seised of, or well entitled unto, &c. (and describing the premises, which were copyhold,) for her life, and the said T. T. hath agreed with the said T. C., that in case he shall be seised of, or entitled unto the said messuage, &c. on the death of the said M. S. he will, immediately on the death of the said M. S. demise and let the same to the said T. C. on the terms and conditions hereinafter mentioned; now, therefore, the said T. T. doth hereby agree to demise and let unto the said T. C. all, &c. and all such copyhold premises as he shall or may be entitled to on the death of the said M. S. to hold, &c. to the said T. C. &c. from and immediately after the death of the said M. S., for the full and whole term of twenty-one years from thence next ensuing, and fully to be complete and ended, at and under the yearly rent of 12*l.* 12*s.* clear of all taxes, (except the

(*a*) 3 Keble, 68.

(*b*) 1 T. R. 735. See Colley v. Streeton, 3 D. and R. 528.

(*c*) 2 T. R. 739. See 5 T. R. 167, where Lord Kenyon says, he wished as far as he could to consider this a lease; but the court thought otherwise.

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land-tax,) payable quarterly; the first payment to be made on the first quarter day next after the death of the said Mary Statham." An agreement followed as to payment of the rent, repairing the premises, and delivering them up at the end of the term. "And the said T. Tidd doth hereby promise and agree to, and with the said T. Clare, his executors, &c., that he the said T. Tidd, on the death of the said Mary Statham, and on his becoming entitled to the said premises, shall and will procure a licence to let the said premises; and that the said T. Clare, his executors, &c. shall peaceably and quietly have, hold, occupy, and enjoy the same for the said term of twenty-one years, without any interruption, &c. of or by the said T. Tidd, or any person or persons claiming, or to claim the said premises, by, from, or under him." The Court of King's Bench was unanimously of opinion, that this was an executory agreement only, and not a lease.

In Doe d. Jackson v. Ashburner (*a*), the articles were as follows: "Articles of agreement between T. S. and D. J. entered into in regard to his fulling-mills, &c. That the said mills, &c. he shall enjoy, and I engage to give him a lease for the term of thirty-one years, from Whitsuntide, 1784, at the rent, &c. And that I will purchase one yard in breadth, to be laid to the race from the High Clews, the length of Charles Close; and if it be bought, and the purchase is more than 200*l.* per acre, he the said D. J. to pay more than it costs beyond that rate." Some stipulations followed respecting altering part of the premises. The court was of opinion, that these articles did not operate as a present demise.

In Morgan d. Dowding v. Bissel (*b*), the contents of the instrument were in substance as follows: "Mr. D. agrees to let to Mr. B. all that farm, &c. (except, &c.) to hold from the 29th of September last, for the term of twenty-one years, determinable, &c., at the rent, &c., and at and under all other usual and customary covenants and agreements, as between landlords and tenants, where the premises are situate." Then followed various stipulations as to cultivation and repairs, and "to allow a proportionate part of the rent for the three pieces of land above excepted." The Court of Common Pleas held this to be only an executory agreement for a lease.

(*a*) 5 T. R. 163. See 15 East, 247. (*b*) 3 Taunt. 65. See 5 B. and A. 326.

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In Doe d. Bromfield v. Smith (*a*), the agreement ran in these words: "Agreed this day to let Mr. S. my house, situate, &c., at the yearly rent of, &c., he paying the taxes. The above agreement to continue during my life, supposing it to be occupied by himself, or a tenant agreeable to me. A clause to be added in the lease to give my son a power to take the house for himself if he chooses, when he comes of age." Lord Ellenborough held this to be merely an agreement for a lease; and the Court of King's Bench confirmed his opinion.

In Hegan v. Johnson (*b*), R. agreed, "that he would by indenture demise to the plaintiff the house then in his occupation, for the term of fourteen years, from the 25th day of December then last past, (determinable as thereinafter mentioned,) at the yearly rent, &c., payable, &c.; but if the plaintiff should pay to Ross the sum of 40*l.* before the expiration of the first quarter, the rent should be reduced, &c." This instrument was held only to be an agreement for a lease.

In Tempest v. Rawling (*c*), the instrument was entitled, "Conditions of letting the four farms after mentioned, &c. The term to be from year to year. The lands to be entered upon the 3rd February, 1808, and the housing on the 12th May. Six months notice to quit to be given. (Then followed certain regulations to be observed by the tenant.) A lease to be made upon these conditions with all usual covenants." At the foot of the paper was written, "I agree to take lot one, (part of the premises) at the rent of, &c., subject to the covenants." This was held to be nothing more than an agreement for a lease to be made hereafter.

In one of the latest cases on this subject, Dunk v. Hunter (*d*), the agreement was as follows: "Memorandum of an agreement between A. H. and D. D. A. H. agrees to let on lease, with purchasing clause for the term of twenty-one years, all that house, &c., entering on the said premises by D. D. any time on or before the 11th February, 1820, at the net clear rent of, &c., and to keep all premises in as good repair, &c., paying on entry 50*l.* The term for seven, fourteen, or twenty-one years, which term D. D. is to give one clear year's notice before the expira-

(*a*) 6 East, 529.
(*b*) 2 Taunt. 148.
(*c*) 13 East, 18.
(*d*) 5 Barn. and Ald. 322; and see also Colley v. Streeton, as reported in 3 D. and R. 522, 528.

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tion of either of the above terms of years, if he intends to leave; if purchases before the expiration of the above term by D. D. he is to pay on purchase 1,000 guineas." It was held, that this instrument only amounted to an agreement for a future lease.

The leading principle which governs the construction of these cases, is the intention of the parties, as it is to be collected from the whole of the agreement (*a*); but, in the application of this rule great difficulty occurs. In some instances, the courts appear to have resorted to collateral circumstances in order to discover the intention of the parties. Thus it is said by Ashurst, J., that "where the words are *de presenti*, "I demise," *and the party is immediately put into possession*, the landlord shall not afterwards turn him out of possession, and say, that it was not a present demise, for *the permitting the party to enter is strong evidence to shew that the landlord intended to give a present interest.*" (*b*) And in Baxter v. Browne (*c*), the circumstances of the uninterrupted possession of the party, and the receipt of rent, were taken into the consideration of the court. It should seem, however, that any collateral circumstances occurring subsequently to the making of the instrument cannot properly be allowed to have any weight in the construction of such instrument. (*d*)

The expressions and circumstances which indicate an intention that the instrument shall operate as *a lease*, appear to be: 1. Words of present demise, as "I demise," or future words, conferring a right of enjoyment, as "that the party shall hold and enjoy" (*e*); and the mere stipulation, that a lease shall at a future time be executed, will not, as it seems, alter the effect of such words. (*f*) The stipulation with regard to a future lease is in such case considered in the light of a covenant for

(*a*) Doe v. Ashburner, 5 T. R. 167, 8, 9. Goodtitle v. Way, 1 T. R. 737. Poole v. Bentley, 12 East, 170. Morgan v. Bissel, 3 Taunt. 72. Doe v. Smith, 6 East, 531.

(*b*) Doe v. Ashburner, 5 T. R. 168.

(*c*) 2 Wm. Bl. 973; and see 5 B. and A. 325.

(*d*) See the observations of Sir W. D. Evans, Chamb. Landl. and Ten. 273; see also what is said by the court in Morgan v. Bissel, 3 Taunt. 71, as to the argument raised from the affixing an agreement stamp to the instrument; and see *ante*, p. 414.

(*e*) Harrington v. Wise, Cro. Eliz. 486; *ante*, p. 516. Baxter v. Browne, 2 W. Bl. 973; *ante*, p. 517. Poole v. Bentley, 12 East, 168; *ante*, p. 517. Barry v. Nugent, 5 T. R. 165; *ante*, p. 517.

(*f*) *Ibid.*

Title.

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further or more formal assurance. (*a*) But where, on the face of the instrument, it is evident, that a future lease is contemplated, (although it be not expressly provided for,) and, at the same time, various terms of the tenancy remain to be ascertained by such lease, then, although there are words of present demise, the instrument will only operate as an agreement. (*b*) 2. Where it is stipulated, that the lessee shall do some act upon the premises before the execution of a formal lease, such stipulation is evidence of an intention to make a present demise. (*c*) 3. A stipulation, that the agreement shall be considered binding until one fully prepared can be produced, is evidence of the same intent. (*d*)

On the other hand, there are various expressions and circumstances which have been held to manifest an intention, that the instrument shall enure as *an agreement* merely. 1. If a forfeiture would be incurred by holding the instrument to be a lease, it should be presumed, that the intention of the parties was to make an agreement for a lease only. (*e*) 2. Any words which shew, that a future act is to be done before the relation of landlord and tenant commences, as the purchase and addition of another piece of land to the premises, will be proof that the instrument was not intended to operate as a lease. (*f*) 3. When a stipulation is contained in the instrument, importing that something ulterior the agreement is to be done by way of a regular lease, this is evidence of the agreement being merely executory. (*g*)

Tenancy at will and cases of lawful possession.

What was formerly considered to be a tenancy at will, has been in modern times construed to be a tenancy from year to year (*h*), unless the circumstances of the case clearly render such a construction impossible, or unless the tenancy at will be created by the express agreement of the parties. No tenancy from year to year, therefore, is created where A. lets a shed to B. for so long as both parties shall like, on an agreement that B. shall

(*a*) Cro. Eliz. 486. 2 W. Bl. 974. 5 T. R. 166. 15 East, 246; but it is difficult to reconcile Sturgeon and Painter, Noy, 128, Goodtitle and Way, 1 T. R. 737, and the observations of the judges in Colley v. Streeton, 3 D. and R. 528, with this position.

(*b*) Morgan v. Bissel, 3 Taunt. 72; *ante*, p. 520.

(*c*) Poole v. Bentley, 12 East, 168; *ante*, p. 517, 13 East, 19.

(*d*) *Ibid.* Doe v. Groves, 15 East, 244; *ante*, p. 518, 5 B. and A. 325.

(*e*) Doe v. Clare, 2 T. R. 739. *Ante*, p. 519.

(*f*) Doe v. Ashburner, 5 T. R. 163. *Ante*, p. 520. 15 East, 247. See Hamerton v. Stead, 3 B. and C. 481.

(*g*) Doe v. Smith, 6 East, 530. *Ante*, p. 521.

(*h*) Timmins v. Rowlison, 3 Burr. 1609. Right d. Flower v. Darby, 1 T. R. 159. Doe d. Shore v. Porter, 3 T. R. 16. Clayton v. Blakey, 8 T. R. 3.

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convert it into a stable, and A. have all the dung for a compensation; there being no reservation referable to any aliquot part of a year. (*a*) Where a party has been let into possession, pending a treaty for a purchase or a lease (*b*), or under a void or imperfect lease, or conveyance (*c*), or where, having been tenant for a term which has expired, he continues in possession, negociating for a new one (*d*), in these and the like cases, where a party comes lawfully into possession he is either a tenant at will, or at all events is in lawful possession and cannot be ejected, until such lawful possession is determined, either by demand of possession, breaking off the treaty, or otherwise. (*e*) But where the vendor of a term before the whole purchase money was paid, agreed with the vendee that he should have possession of the premises till a given day, paying the reserved rent in the meantime; and that in case he did not pay the residue of the purchase money on that day, he should forfeit the portion he had already paid, and not be entitled to an assignment of the lease, Lord Ellenborough, C. J. held that this agreement operated like a clause of re-entry on a breach of covenant in a lease, and that the residue of the purchase money not being paid upon the appointed day, the vendee's interest thereupon ceased, and he might be ejected without any notice to quit. (*f*) So where a man got into possession of a house without the privity of the landlord, and the parties afterwards entered into a negociation for a lease, but disagreed about the value of the fixtures; in an ejectment brought by the landlord, Lord Ellenborough was of opinion that if this was a tenancy of any sort, it was a tenancy at sufferance, and a notice to quit was unnecessary. (*g*)

(*a*) Richardson v. Langridge, 4 Taunt. 128.

(*b*) Goodtitle d. Gallaway v. Herbert, 4 T. R. 680. Dunk v. Hunter, 5 B. and A. 322. Doe d. Newby v. Jackson, 1 B. and C. 448. "Where parties enter under a mere agreement for a future lease, they are tenants at will, and if rent is paid under the agreement they become tenants from year to year." *Per* Littledale, J. Hammerton v. Stead, 3 B. and C. 485.

(*c*) Litt. sec. 70. Corbet v. Stone, Sir T. Raym. 147. Doe d. Warren v. Fearnside, 1 Wils. 176.

(*d*) Doe d. Hollingsworth v. Stennett, 2 Esp. N. P. C. 717.

(*e*) Right d. Lewis v. Beard, 13 East, 210. Denn d. Brune v. Rawlins, 10 East, 261. Doe d. Hollingsworth v. Stennett, 2 Esp. N. P. C. 717. Goodtitle d. Gallaway v. Herbert, 4 T. R. 680. Doe d. Newby v. Jackson, 1 Barn. and Cres. 448. See also Whiteacre d. Boult v. Symonds, 10 East, 13, and Doe d. Biggs v. White, 2 D. and R. 716.

(*f*) Doe d. Leeson v. Sayer, 3 Camp. N. P. C. 8.

(*g*) Doe d. Knight v. Quigley, 2 Campb. N. P. C. 505. And see Doe d. Moore v. Lawder, 1 Stark. N. P. C. 308.

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A schoolmaster having a freehold interest in his office cannot be ejected by the feoffees and visitors of the school, until his interest has been determined upon summons in the regular way. (*a*)

A mortgagor in possession, with the consent of the mortgagee, must be regarded either as tenant at will or by sufferance (*b*), yet an ejectment may, it is said, be maintained against him by the mortgagee, before any actual determination of the will or demand of possession. (*c*) Nor does the tenant of the mortgagee stand in any better situation than the mortgagor himself, where the tenancy is created *after* the mortgage. (*d*) So if he be let into possession after the mortgage made, but before the assignment of it to the lessor of the plaintiff (*e*), but where he comes in under the mortgagor, *prior* to the mortgage, he is entitled, if tenant from year to year, to half a year's notice. (*f*).

Payment and receipt of rent will in many cases operate so as to create a tenancy from year to year, and render a notice to quit necessary. Thus if tenant for life makes a lease, and dies, whereby the lease expires, if the remainderman receives rent from the tenant, a tenancy from year to year is created. (*g*) So where tenant for life makes an unauthorised lease under a power, which is void as against the remainderman, and the latter after the death of the tenant for life receives rent from the tenant,

(*a*) Doe d. Earl of Thanet v. Garthham, 1 Bingh. 357.

(*b*) Partridge v. Bere, 5 B. and A. 604. Thunder d. Weaver v. Belcher, 3 East, 449. Coote on Mortgages, 327.

(*c*) Birch v. Wright, 1 T. R. 383, *quære.*

(*d*) Keech v. Hall, Dougl. 21.

(*e*) Thunder d. Weaver v. Belcher, 3 East, 449.

(*f*) Birch v. Wright, 1 T. R. 380.

(*g*) Sykes d. Murgatroyd v. Birkett, cited 1 T. R. 161. Roe d. Jordan v. Ward, 1 H. Bl. 97. Payment of rent is conclusive evidence of a tenancy, Bishop v. Howard, 2 B. and C. 100. But where the receipt for rent was given, first in the name of A. who originally demised, and afterwards of A. and B., it was held that A. might recover on a demise by himself. Doe v. Baker, 2 B. Moore, 189. Payment of rent under threat of a distress, and with a denial of title, is no evidence of tenancy, Burne v. Richardson, 4 Taunt. 720; and where in ejectment to recover two pieces of land, it appeared that the lessor of the plaintiff was lord of the manor of B.; and in order to shew that the defendant was his tenant, evidence was given of payment by the defendant of a rent of 2*s.* for one piece of land, and of 4*s.* 3*d.* for another piece, which rents had been paid since 1780, until 1819, Holroyd, J. ruled that this was evidence of a title to the rents, but not to the land, the presumption being that they were quit rents. And on a motion for a new trial the court acquiesced in this opinion. Whittick v. Johnson, cited Com. Land. and Ten. 453.

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as between landlord and tenant, a jury from such circumstances may infer a tenancy from year to year (*a*); and it does not seem to alter the case that the remainderman was ignorant of his title at the time when he received the rent. (*b*) So where a party is let into possession under a lease which is void by the statute of frauds, though payment and receipt of rent will not establish the lease, yet they will create a tenancy from year to year, regulated by the covenants and conditions of the void lease. (*c*) Where a feme covert, who has for many years been separated from her husband, has, during that time received for her separate use the rents of certain lands which came to her by devise, after the separation, a jury may presume that she received the rents by her husband's authority, who having thus acknowledged a tenancy, must give a notice to quit before he can maintain ejectment. (*d*)

Where lands descended to an infant, with respect to whom the tenant was a trespasser, and an ejectment was brought on the demise of the infant, and compromised by his attorney on the terms that the tenant should pay 100*l.* for rent arrear, and attorn to the infant; in a second ejectment brought by the infant on attaining his full age, although no evidence was given of rent received by him after coming of age, or of any other confirmation of the tenant's title, Lord Kenyon held that a new tenancy had been created, and that a notice to quit was necessary. (*e*)

When the tenant has attorned to another person, or done any act disclaiming to hold of his landlord, or has in any way put him at defiance, the landlord may treat him as a trespasser, and no notice to quit will be necessary (*f*); but a refusal to pay rent to a devisee under a will which was contested, the tenant declaring that he was ready to pay his rent to any person who was entitled to receive it, was held not to be such a disavowal of title as to enable the devisee to maintain ejectment without a notice to quit. (*g*)

(*a*) Doe d. Brune v. Prideaux, 10 East, 187. Doe d. Martin v. Watts, 7 T. R. 83. Right d. Dean and Chapter of Wells v. Bawden, 3 East, 260.

(*b*) Doe d. Martin v. Wells, 7 T. R. 83, 86.

(*c*) Doe d. Regge v. Bell 5 T. R. 471. Clayton v. Blakey, 8 T. R. 3. and see Doe d. Warner v. Browne, 8 East, 165. Roe d. Jordan v. Ward, 1 H. Bl. 97.

(*d*) Doe d. Leicester v. Biggs, 1 Taunt. 367.

(*e*) Doe d. Miller v. Noden, 2 Esp. N. P. C. 530.

(*f*) Throgmorton v. Whelpdale, Bull. N. P. 96.

(*g*) Doe d. Williams v. Pasquali, Peake's N. P. C. 196.

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2. At what time the notice must be given.

The death either of the lessor or of the lessee, does not, in case of a lease from year to year, put an end to the tenancy; the interest vests in the representatives of the lessee, to whom notice to quit must be given, before the lessor or his representatives can recover in ejectment. (*a*)

Unless some other period be fixed by agreement or local custom, the law requires half a year's notice to be given to determine a tenancy from year to year, which half year must consist of one hundred and eighty-two days, except where the rent is payable on the usual quarterly feast days, when notice on one feast day to quit on the next but one is sufficient (*b*); but the length of time required by law, may be controlled by special agreement or local custom. (*c*) Where the tenancy is for less than a year, the length of the notice must be regulated by the letting, as a month's notice for a monthly letting. (*d*) A reservation of rent quarterly on a tenancy from year to year, does not dispense with half a year's notice. (*e*)

Must expire at the expiration of the year, &c.

Whatever be the length of time required in the notice, such notice must be given so as to expire at the expiration of the year (*f*); or where the tenancy is for less than a year at the expiration of such shorter period, or some corresponding period. (*g*) On a letting from year to year to quit at a quarter's notice, the quarter's notice must expire with the current year of the tenancy. (*h*)

When the tenancy shall be taken to commence.

In general the tenancy will be taken *primâ facie*, to commence from the day of the tenant's entering, and not with reference to any particular quarter day; therefore, where a quarterly tenant entered on the 29th of October, in the absence of any agreement to the contrary, Lord Ellenborough held that the notice must be made

(*a*) Doe d. Shore v. Porter, 3 T. R. 13. James v. Dean, 11 Ves. 393. Parker d. Walker v. Constable, 3 Wils. 25.

(*b*) Right v. Darby, 1 T. R. 159. Doe d. Harrop v. Green, 4 Esp. N. P. C. 199. Doe d. D. of Bedford v. Kightley, 7 T. R. 63. Howard v. Wemsley, 6 Esp. N. P. C. 53.

(*c*) Roe d. Henderson v. Charnock, Peake, N. P. C. 4. Tyler v. Seed, Skin. 649. Timmins v. Rowlinson, 3 Burr. 1609. As to dispensing with the usual notice, see Shirley v. Newman, 1 Esp. N. P. C. 266.

(*d*) Doe d. Parry v. Hassell, 1 Esp. N. P. C. 94. See Wilson v. Abbot, 3 B. and C. 88. 1 T. R. 162.

(*e*) Shirley v. Newman, 1 Esp. N. P. C. 266.

(*f*) Right d. Flower v. Darby, 1 T. R. 159. Doe d. Spicer v. Lea, 11 East, 312.

(*g*) Kemp v. Derrett, 3 Campb. N. P. C. 510.

(*h*) Doe d. Pitcher v. Donavan, 1 Taunt. 555. 2 Campb. N. P. C. 78.

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to expire on the 29th of January, 29th of April, 29th of July, or 29th of October (*a*); but where a tenant enters in the middle of a quarter, and afterwards pays for that half quarter, and continues to pay from the commencement of a succeeding quarter, he is not a tenant from the time of his coming in, but from the succeeding quarter day. (*b*)

If the tenant holds over by consent after the expiration of a lease, he becomes tenant from year to year, and notice to quit must be given with reference to the original time of entry under the lease (*c*), so where the lease is determined by the death of the lessor, tenant for life, in the middle of a year (*d*); and though a lease be void by the statute of frauds, yet a tenancy from year to year may arise, which must be regulated by the terms of the void lease, as to the time of the year when the tenant is to quit. (*e*)

Where the tenant enters upon different parts of the premises at different times, it is sufficient to give half a year's notice to quit, with reference to the original time of entry, on the substantial part of the premises demised, which will be good for all. (*f*) What is the principal, and what the accessory part of the premises demised, is a question of fact for the jury, after which the judge is to decide whether the notice was correct. (*g*)

A holding from Michaelmas, *primâ facie*, signifies the feast of St. Michael, according to the new style (*h*); but where the tenancy was from Michaelmas to Michaelmas, and notice was given on the 20th March, 1793, to quit on the 10th October following (old Michaelmas), Lord Kenyon permitted evidence to be given, that, by the custom of the country, such a tenancy from Michaelmas generally was considered to be old Michaelmas, and held the notice to be regular (*i*), and where the tenancy is from

(*a*) Kemp. v. Derrett, 3 Camp. N.P. C. 510.

(*b*) Doe d. Holcomb v. Johnson, 6 Esp. N. P. C. 10.

(*c*) Doe d. Castleton v. Samuel, 5 Esp. N. P. C. 173. And so with regard to his assignee. *Ibid.*

(*d*) Doe d. Jordan v. Ward, 1 H. Bl. 97. *Ante*, p. 525.

(*e*) Doe d. Rigge v. Bell, 5 T. R. 472.

(*f*) Doe d. Daggett v. Snowdon, 2 W. Bl. 1224. Doe d. Strickland v. Spence, 6 East, 120. Doe d. Ld. Bradford v. Watkins, 7 East, 551.

(*g*) Doe d. Heapy v. Howard, 11 East, 498.

(*h*) Doe d. Hinde v. Vince, 2 Campb. N. P. C. 257.

(*i*) Forley d. Mayor Cant. v. Wood, Run. Eject. 112, 1st edit. 1 Esp. N. P. C. 198, S. C. Doe d. Hall v. Benson, 4 B. and A. 588, S. P. So evidence of the intention of the parties is admissible, Den d. Peters v. Hopkinson, 3 D. and R. 507.

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old Michaelmas, a notice to quit "at Michaelmas," generally is good. (*a*) But where in a lease of lands *by deed* the tenancy was expressed to be "from the feast of St. Michael," it was held that those words imported New Michaelmas, and could not be shewn by extrinsic evidence to refer to *Old* Michaelmas, and that a notice to quit at Old Michaelmas, though given half a year before new Michaelmas, was bad. (*b*)

The notice to quit not having been personally served upon the tenant, is not of itself even *primâ facie* evidence of the tenancy having commenced at that period of the year at which the notice expires. (*c*) But if personally served upon the tenant, who does not object to it, this is *primâ facie* evidence of the commencement of the tenancy (*d*), but such *primâ facie* evidence may be rebutted by shewing the period when the tenancy did in fact commence. (*e*) However, if the tenant upon application by his landlord state his tenancy to have commenced on a particular day, he is concluded from disputing the accuracy of such statement. (*f*) A receipt for rent up to a particular day, is *primâ facie* evidence of the commencement of the tenancy at that day. (*g*)

3. By whom given.

3. As jointenants may demise their shares severally, one of them, in case of a joint demise, may give a notice to quit, which will be good for the share of the party giving such notice (*h*); and where the demise is joint, and a notice is given signed by a stranger professing to be an agent for all the jointenants, their subsequent recognition of his authority will be sufficient (*i*); but where a lease for twenty-one years contained a proviso, that in case either landlord or tenant, or their respective heirs and executors wished to determine it at the end of the first fourteen years, and should give six months notice in writing, under his and their respective hands, the term should cease, it was held that a notice to quit signed by two only of three executors of the original lessor,

(*a*) Doe d. Hinde v. Vince, 2 Campb. N. P. C. 256.

(*b*) Doe d. Spicer v. Lea, 11 East, 312. 4 B. and A. 589.

(*c*) Doe d. Ash v. Calvert, 2 Campb. N. P. C. 388.

(*d*) Thomas d. Jones v. Thomas, 2 Campb. N. P. C. 648. Doe d. Clarges v. Forster, 13 East, 405. And see Doe d. Baker v. Wombwell, 2 Campb. N. P. C. 560.

(*e*) Oakapple d. Green v. Copous, 4 T. R. 361. 4 Esp. N. P. C. 7.

(*f*) Doe d. Eyre v. Lambly, 2 Esp. N. P. C. 635.

(*g*) Doe d. Castleton v. Samuel, 5 Esp. N. P. C. 173.

(*h*) Doe d. Whayman v. Chaplin, 3 Taunt. 120.

(*i*) Goodtitle d. King v. Woodward, 3 B. and A. 689.

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to whom he had bequeathed the freehold as jointenants, expressing the notice to be given on behalf of themselves and the third executor, was not good, notwithstanding a subsequent recognition of it by the third executor. (*a*)

A receiver appointed by the Court of Chancery, with authority to let lands from year to year, has also authority to determine such tenancies by a regular notice to quit. (*b*) A verbal notice from the steward of a corporation is sufficient, without shewing that he had an authority under seal from the corporation. (*c*)

Where there was a proviso in a lease for twenty-one years, that if either of the parties should be desirous to determine it in seven or fourteen years, it should be lawful for either of them, his executors or administrators so to do, upon twelve months notice to the other of them, his heirs, executors, or administrators, it was held that the *devisee* of the lessor was entitled to give such notice. (*d*)

4. To whom given.

4. Where the premises have been underlet, the original lessor cannot determine the subtenancy by a notice to the subtenant, between whom and himself there is no privity. Such tenancy must be determined either by a notice from the lessor to the lessee, or from the lessee to the sublessee (*e*), and the notice from the lessor to the lessee should be served upon the latter, for where the service was upon a relation of the under-tenant upon the premises, lord Ellenborough, C. J. ruled the service to be insufficient, although the notice was addressed to the original lessee. (*f*)

Where a corporation are tenants, the notice to quit should be given *to the corporation*, and may be served upon its officers. (*g*)

5. Form of the notice.

5. A notice to quit may in all cases be by parol, unless a written notice be required by agreement of the parties (*h*), or by the provisions of a power. (*i*) Although the courts listen with re-

(*a*) Right d. Fisher v. Cuthell, 5 East, 491.

(*b*) Doe d. Marsack v. Read, 12 East, 57. Wilkinson v. Colley, 5 Burr. 2694, 2698.

(*c*) Roe d. Dean &c. of Rochester v. Pierce, 2 Campb. N. P. C. 96.

(*d*) Roe d. Bamford v. Hayley, 12 East, 464.

(*e*) Pleasant d. of Hayton v. Benson, 14 East, 234. Roe v. Wiggs, 2 N. R. 330.

(*f*) Doe d. Mitchell v. Levi, MS. Adams on Eject. 115, 2nd edit.

(*g*) Doe v. Woodman, 8 East, 228.

(*h*) Timmins v. Rowlison, 3 Burr. 1603. Doe v. Crick, 5 Esp. N. P. C. 196. Roe v. Pierce, 2 Campb. N. P. C. 96.

(*i*) Legg d. Scott v. Benion, Willes, 43.

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luctance to objections to the form of the notice (*a*), it must yet be explicit and positive, and not give the tenant an option of continuing under a new agreement; however, a notice to quit, "or I shall insist on double rent," was held good, because the latter part of the notice evidently referred only to the penalty inflicted by the statute, 4 Geo. 2, c. 28, though the terms of that statute, which gives double the annual *value*, were mistaken (*b*); and where the notice was to quit "on the 25th day of March, or 8th day of April next ensuing," and was delivered before new Michaelmas day, it was held good, as intended to meet a holding, commencing either at new or old Lady-day, and not to give an alternative. (*c*) So in case of an obvious mistake, the courts will hold the notice to be good, as where a notice was given at Michaelmas, 1795, to quit at Lady-day, "which will be in the year 1794," and the defendant was told at the time of the service of the notice, that he must quit at *next* Lady-day. (*d*) And so a notice dated on the 27th September, and served on the 28th, requiring the tenant to quit "at Lady-day *next*," will be understood to mean Lady-day in the succeeding year. (*e*) So a mis-description of the premises which can lead to no mistake, will not be fatal, as where a house is described as "the Waterman's Arms," when in fact it was called "the Bricklayer's Arms," there being no sign called the Waterman's Arms in the parish. (*f*)

As a lessor cannot determine the tenancy as to part of the things demised, and continue it as to the rest, the notice must include all the premises held under the same demise, and the courts will, if possible, give effect to the notice, so as to determine the tenancy altogether. (*g*)

The cases arising out of the alteration of the style have already been noticed. (*h*)

Where the notice is in writing, it is not necessary that it should be directed to the tenant in possession, provided it be personally served upon him (*i*), and where it is directed to him by a

(*a*) Doe d. Rodd v. Archer, 14 East, 245.

(*b*) Doe d. Matthews v. Jackson, Doegl. 175.

(*c*) Doe d. Matthewson v. Wrightman, 4 Esp. N. P. C. 5.

(*d*) Doe d. Duke of Bedford v. Kightley, 7 T. R. 63.

(*e*) Doe d. Lord Huntingtower v. Culliford, 4 D. and R. 248.

(*f*) Doe d. Cox v. ———, 4 Esp. N. P. C. 185.

(*g*) Doe lessee of Rodd v. Archer, 14 East, 245. Doe d. Morgan v. Church, 3 Campb. N. P. C. 71.

(*h*) *Ante*, pp. 528, 529.

(*i*) Doe d. Matthewson v. Wrightman, 4 Esp. N. P. C. 5.

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6. Service of the notice.

wrong Christian name, and he keeps it, it is a waiver of the irregularity. (*a*)

6. It is sufficient if the notice be delivered and explained to the servant of the tenant at his dwelling house, though the dwelling house be not upon the demised premises, such service being presumptive evidence that the notice came to the hands of the tenant, the servant not being called (*b*); but it is not sufficient to shew merely that the notice was left at the tenant's dwelling house, without shewing that it was delivered to a servant. (*c*) Evidence of the notice having been served on the premises, on one of two jointenants who resided on the premises, is presumptive evidence of the notice having reached the other jointenant. (*d*) If there be a subtenant, the notice should be served upon the original lessee. (*e*) Where the notice is signed by an attesting witness, he must be produced; it is not sufficient that the tenant when he read the notice made no objection to it. (*f*) Notice to quit to a corporation, may be served upon its officers. (*g*)

7. Waiver of notice.

7. A notice to quit may be waived by the acceptance of rent after the expiration of the notice, but it must be received *as* rent, which is a question for the jury (*h*), and where a quarter's rent due after the expiration of the notice had been received by the landlord's banker, without any special authority, though the rent had been usually paid to him, it was held, in the absence of any proof that the rent had come to the landlord's hands, not to be a waiver of the notice. (*i*) So a distress for rent accruing due after the expiration of the notice is a waiver (*k*); but after a verdict in ejectment against a tenant, for not quitting according to notice, a subsequent distress by the landlord for rent due after the verdict, does not waive the notice to quit; nor is it any ground for setting aside the verdict or staying execution. (*l*)

A recovery in an action for use and occupation for a period

(*a*) Doe v. Spiller, 6 Esp. N. P. C. 70.

(*b*) Jones d. Griffiths v. Marsh, 4 T. R. 464.

(*c*) Doe d. Burgess v. Lucas, 5 Esp. N. P. C. 153.

(*d*) Doe d. Lord Bradford v. Watkins, 7 East, 557. Doe d. Lord Macartney v. Crick, 5 Esp. N. P. C. 196.

(*e*) *Ante*, p. 532.

(*f*) Doe d. Sykes v. Durnford, 2 M. and S. 62.

(*g*) Doe v. Woodman, 8 East, 228.

(*h*) Goodright d. Charter v. Cordwent, 6 T. R. 219. Doe d. Cheny v. Batten, Cowp. 242. Doe d. Ash v. Calvert, 2 Campb. N. P. C. 387.

(*i*) Coe d. Ash v. Calvert, 2 Campb. N. P. C. 387.

(*k*) Doe d. Ward v. Willingale, 1 H. Bl. 311.

(*l*) Doe d. Holmes v. Darby, 8 Taunt. 538.

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subsequent to the expiration of the notice, seems to be a waiver of the notice. (*a*)

So a notice to quit may be waived by a subsequent notice, for it recognises a tenancy subsisting after the expiration of the former (*b*), but it does not necessarily recognise a tenancy; for where a second notice to quit was given after the expiration of the first notice, and also after the commencement of an ejectment, in which the landlord continued to proceed, notwithstanding the second notice, it was held to be no waiver, for it was not possible for the defendant to suppose the plaintiff intended to waive the first notice, when he knew the plaintiff was on the foundation of that very notice proceeding by ejectment, to turn him out of his farm. (*c*) So where after the expiration of a notice the landlord gave a second notice, "I do hereby require you to quit the premises which you now hold of me, within fourteen days from this date, otherwise I shall require double value;" it was ruled that the latter notice having for its object only the recovery of the double value, did not operate as a waiver. (*d*)

So also in a case where no notice to quit was necessary, a notice was given "to quit the premises which you hold under me, your term therein having long since expired;" the court considered it a mere demand of possession, and not a recognition of a subsisting tenancy. (*e*) And so where a landlord gave his tenant notice to quit, but promised not to turn him out, unless the premises were sold, and afterwards, and after the expiration of the notice to quit, the premises were sold, but the tenant refused to deliver up the possession, it was held that the promise was no waiver of the notice, and that the refusal of the tenant made him a trespasser from the expiration of the notice to quit. (*f*)

On forfeiture.

The interest of the tenant may determine by forfeiture (*g*) or breach of a condition of re-entry where such right of re-entry has been reserved in the lease for non-payment of rent, or non-performance of covenants, in which case the landlord may recover

(*a*) See Birch v. Wright, 1 T. R. 387.

(*b*) Doe d. Brierley v. Palmer, 16 East, 53.

(*c*) Doe d. Williams v. Humphreys, East, 236.

(*d*) Doe d. Digby v. Steel, 3 Campb. N. P. C. 115.

(*e*) Doe d. Godsell v. Inglis, 3 Taunt. 54. Messenger v. Armstrong, 1 T. R. 53.

(*f*) Whiteacre d. Boult v. Symonds, 10 East, 13.

(*g*) Com. Dig. Forfeiture, (A).

Title.

Of particular persons.

Landlord. On forfeiture. Who may take advantage of it.

the premises in ejectment, and no actual entry will be necessary previously to bringing the action. (*a*)

The grantor or feoffor, and his heirs, were the only persons at common law who were entitled to enter upon a breach of a condition in fact, though for a forfeiture or breach of a condition in law, the assignee of the reversion might enter (*b*), but by statute 32 Hen. 8, c. 34, the assignee of the reversion may also enter for a breach of a condition in fact. (*c*) It is not necessary that there should be a reversion in the party to whom a right of re-entry is reserved; thus, a lessee may assign the whole of his term upon condition, and enter or maintain ejectment for the breach of such condition (*d*), but such a condition cannot be reserved to a stranger (*e*), and it must be taken advantage of during the continuance of the lease, for when that is determined, the condition is gone. (*f*)

Where a lease contains a condition for re-entry in case of a breach of any of the covenants to be performed on the part of the lessee, a breach of any of such covenants will be a breach of the condition, and the lessor will be entitled to re-enter. (*g*) The condition is sometimes limited to particular covenants only. Thus, where a lease contained a covenant not to assign without licence, after which was inserted a proviso, that if the rent should be in arrear, or if all or any of the covenants *thereinafter* contained on the part of the lessee should be broken, the lessor might re-enter, it was held, that the lessor was not entitled to enter for a breach of the covenant not to assign. (*h*) Sometimes the proviso for re-entry is specially confined to the non-payment of rent. Where a tenant holds under an agreement for a lease, which specifies the covenants to be inserted in the lease with a right of re-entry for a breach of them, ejectment may be brought on a breach, although no lease has ever been executed. (*i*)

Proceedings on forfeiture at common law.

Before a forfeiture could be incurred by non-payment of rent,

(*a*) Little v. Heaton, 1 Salk. 259. 2 Ld. Raym. 750, S. C. *Ante*, p.

(*b*) Com. Dig. Condition, (C. 1). *Ante*, p. 510.

(*c*) See *ante*, p. 510.

(*d*) Doe d. Freeman v. Bateman, 2 B. and A. 168.

(*e*) Co. Litt. 214, b. Doe d. Barber v. Lawrence, 4 Taunt. 23.

(*f*) Johns v. Whitley, 3 Wils. 140.

(*g*) As to what acts will amount to a re-entry, see Doe d. Harley v. Wood, 2 B. and A. 724, 742.

(*h*) Doe v. Spencer v. Godwin, 4 M. and S. 265.

(*i*) Doe d. Oldershaw v. Breach, 6 Esp. N. P. C. 106.

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the common law required several acts to be done by the lessor. 1. There must be a demand of the rent (*a*), but such demand may be made by an agent having sufficient authority, which authority he is not bound to show, unless required so to do. (*b*) 2. The demand must be of the precise rent due. (*c*) 3. It must be made precisely upon the day when the rent is due and payable by the lease to save the forfeiture. (*d*) 4. It must be made such a convenient time before sunset, as will be sufficient to have the money counted. (*e*) 5. The demand must be made at the *most notorious place* upon the land, as if there be a house on the land, the demand must be made at the front door (*f*), unless a place is appointed off the land where the rent is payable, in which case the demand must be made at such place. (*g*) It is not material whether any one be on the land (*h*), and, if a stranger be upon the land, and the demand be made of him, it is still a good demand. (*i*) To obviate the difficulties imposed by this mode of proceeding, it is enacted by statute 4 Geo. 2, c. 28, s. 2,

Stat. 4 G. 2. c. 28.

That in all cases between landlord and tenant, as often as it shall happen that one half year's rent shall be in arrear, and the landlord or lessor to whom the same is due hath right by law to re-enter for the non-payment thereof, such landlord and lessor shall and may, without any formal demand or re-entry, serve a declaration in ejectment for the recovery of the demised premises; or in case the same cannot be legally served, or no tenant be in actual possession of the premises, then to affix the same upon the door of any demised messuage, or in case such ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements, or hereditaments, comprised in such declaration in ejectment, and such affixing shall be deemed legal service thereof, which service or affixing such declaration in ejectment shall stand in the place and stead of a demand and re-entry; and, in case of judgment against the casual ejector, or non-suit for not confessing lease entry and ouster, it shall be made appear to the court where the said suit is depend-

(*a*) Br. Ab. Dem. 19. 1 Saund. 287. note, 5th edit. Gilb. Rents, 73.

(*b*) Roe d. West v. Davis, 7 East, 363.

(*c*) Fabian and Windsor's case, 1 Leon. 305. Cro. Eliz. 209, S. C.

(*d*) Co. Litt. 202, a; and Hargrave's note, (3). Gilb. Rents, 91.

(*e*) *Ibid.*

(*f*) Co. Litt. 201, b. 202, a. Maund's case, 7 Rep. 28. Gilb. Rents, 87.

(*g*) Co. Litt. 202, a.

(*h*) *Ibid.*

(*i*) Doe d. Brook v. Brydges, 2 D. & R. 29.

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Of particular persons.

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ing by affidavit, or be proved upon the trial in case the defendant appears, that half a year's rent was due before the said declaration was served, and that no sufficient distress was to be found on the demised premises, countervailing the arrears then due, and that the lessor or lessors in ejectment had power to re-enter; then and in every such case the lessor or lessors in ejectment shall recover judgment and execution in the same manner as if the rent in arrear had been legally demanded, and a re-entry made; and in case the lessee or lessees, his, her, or their assignee or assignees, or other person or persons claiming or deriving under the said leases, shall permit and suffer judgment to be recovered on such ejectment, and execution to be executed thereon, without paying the rent and arrears together, with full costs, and without filing any bill or bills for relief in equity, within six calendar months after such execution executed; then and in such case the said lessee or lessees, his, her, or their assignee or assignees, and all other persons claiming and deriving under the said lease, shall be barred and foreclosed from all relief or remedy in law or equity, other than by writ of error for reversal of such judgment, in case the same shall be erroneous, and the said landlord or lessor shall from thenceforth hold the said demised premises discharged from such lease; and, if on such ejectment a verdict shall pass for the defendant, or the plaintiff shall be non-suited therein, except for the defendant, &c. not confessing, &c. then such defendant, &c. shall have and recover his, her, and their full costs: provided always, that nothing herein contained shall extend to bar the right of any mortgagee or mortgagees of such lease, or any part thereof, who shall not be in possession, so as such mortgagee or mortgagees shall and do within six calendar months after such judgment obtained, and execution executed, pay all rent in arrear, and all costs and damages sustained by such lessor, person, or persons entitled to the remainder or reversion as aforesaid, and perform all the covenants and agreements which on the part and behalf of the first lessee or lessees are and ought to be performed.

By section 3, "in case the said lessee or lessees, his, her, or their assignee or assignees, or other person claiming any right, title, or interest, in law or equity, of, in, or to the said lease, shall within the time aforesaid, file one or more bill or bills for relief in any court of equity, such person or persons shall not have or continue any injunction against the proceedings at law on such

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ejectment, unless he, she, or they shall, within forty days next after a full and perfect answer shall be filed by the lessor or lessors of the plaintiff in such ejectment, bring into court, and lodge with the proper officer, such sum of money as the lessor or lessors of the plaintiff in the said ejectment shall in his, her, or their answer, swear to be due and in arrear, over and above all just allowances, and also the costs taxed in the said suit, there to remain till the hearing of the cause, or to be paid out to the lessor or landlord on good security, subject to the decree of the court; and, in case such bill or bills shall be filed within the time aforesaid, and after execution is executed, the lessor or lessors of the plaintiff shall be accountable only for so much and no more, as he, she, or they shall really and *bonâ fide*, without fraud, deceit, or wilful neglect, make of the demised premises, from the time of his, her, or their entering into the actual possession thereof; and, if what shall be so made by the lessor or lessors of the plaintiff, happen to be less than the rent reserved on the said lease, then the said lessee or lessees, his, her, or their assignee or assignees, before he, she, or they shall be restored to his, her, or their possession or possessions, shall pay such lessor or lessors, or landlord or landlords, what the money so by them made, fell short of the reserved rent, for the time such lessor or lessors of the plaintiff, landlord or landlords, held the same lands."

Section 4. "Provided, that if the tenant or tenants, his, her, or their assignee or assignees, shall at any time before the trial in such ejectment, pay or tender to the lessor or landlord, his executors or administrators, or his, her, or their attorney in that cause, or pay into the court where the same cause is depending, all the rent and arrears, together with the costs, then all further proceedings on the said ejectment shall cease and be discontinued, and, if such lessee or lessees, his, her, or their executors, administrators, or assigns, shall upon such bill filed as aforesaid, be relieved in equity, he, she, and they shall have, hold, and enjoy the demised lands according to the lease thereof made, without any new lease be thereof made to him, her, or them."

It is observable, that this statute is intended to afford certain benefits in actions of ejectment between landlords and tenants; 1. To the landlord. 2. To the tenant; and 3rdly, to the mortgagee of the lease.

1. *The remedy given by the statute to the landlord.* By the second section of the statute the formal demand required at com-

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mon law is dispensed with, provided half a year's rent be due before the declaration served, and no sufficient distress be found on the demised premises. This section of the statute, therefore, does not apply to cases where there is a sufficient distress upon the premises, and in such cases consequently the lessor must still proceed as at common law (*a*); but where a lease contained a proviso, that if the rent was in arrear for twenty-one days, the lessor might re-enter "although no legal or formal demand should be made," it was held, that ejectment might be maintained without any formal demand, even though there was a sufficient distress upon the premises to countervail the arrears of rent. (*b*) And, where a lease contained a proviso for re-entry in case the rent were in arrear twenty-one days after the day on which it was due, "being lawfully demanded," three judges (Lord Ellenborough, C. J. *dissent.*) held the case to be within the statute, and that it was unnecessary to prove an actual demand. (*c*) Wherever the statute applies it has been thought to be compulsory, and that the landlord cannot proceed as at common law. (*d*)

Proof that no sufficient distress was found on the premises on some one day after the day on which the rent is payable to save the forfeiture, and before the day of serving the declaration in ejectment, is *primâ facie* evidence, and sufficient to bring the case within the statute, unless the defendant shew that there was a sufficient distress. (*e*) This clause of forfeiture must be pursued strictly, and every part of the premises must be searched. (*f*)

The statute prescribes a method of proceeding in ejectment in two cases, viz. one in case of judgment against the casual ejector, the other in case of its coming to a trial. In the former case, an affidavit must be made in the court where the suit is depending, that half a year's rent was due before the declaration was served, and that no sufficient distress was to be found on the premises countervailing the arrears then due, and that the lessor

(*a*) Doe d. Forster v. Wandlass, 7 T. R. 117. See Lord Ellenborough's construction of the statute, Roe d. West v. Davis, 7 East, 363.

(*b*) Doe d. Harris v. Masters, 2 Barn. and C. 490. Dormer's case, 5 Rep. 40, b. Goodright v. Cator, Dougl. 477.

(*c*) Doe d. Scholefield v. Alexander, 2 M. and S. 525, recognised in Doe d. Earl of Shrewsbury v. Wilson, 5 Barn. and A. 385; and see *ib.* p. 393.

(*d*) *Per* Wood, B. in Doe d. Jersey v. Smith, 1 Brod. and B. 187.

(*e*) Doe d. Smelt v. Fuchau, 15 East, 286.

(*f*) Rees d. Powell v. King, cited in Smith v. Jersey, 2 B. and B. 514. Forest, 19.

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had power to re-enter: in the latter case the same thing must be proved upon the trial. (*a*) The affidavit may be presumed after a long and quiet possession. (*b*)

2. *The remedy given by the statute to the lessee.* Before the 4 Geo. 2, c. 28, the tenant after being ejected might have applied at any time to a court of equity for relief (*c*), but now by that statute (sec 2.) he is debarred from filing his bill in equity, unless within six calendar months from the time of execution. (*d*) The power given to the tenant of staying the proceedings in ejectment on paying or tendering to the landlord, or paying into court the arrears of rent or costs, is limited by the statute (sec. 4), to a payment before trial. (*e*) No provision is expressly made for the relief of the tenant by payment of the rent and costs, in case of a judgment by default against the casual ejector (*f*); but the courts in such case will stay proceedings on payment of the rent and costs. (*g*) Where the tenant tendered the rent in arrear, after the lessor had given instructions to his attorney to commence an action, but before the declaration was delivered, the court set aside the proceedings with costs (*h*); and where an ejectment was brought on a clause of re-entry in a lease, for not repairing as well as for rent in arrear, the court granted a rule to stay proceedings on payment of the rent, with liberty for the lessor to proceed on any other title. (*i*) A court of equity will only relieve the tenant where the forfeiture has been incurred by his neglect to pay a sum of money, and not when it has been incurred by a breach of covenant, sounding wholly in damages, where the parties cannot be put *in statu quo* (*k*), unless the forfeiture be the effect of inevitable accident, and the injury be capable of compensation. (*l*)

(*a*) Sergt. Williams's note, 1 Saund. 287, c, note, 5th edit.

(*b*) Doe d. Hitchings v. Lewis, 1 Burr. 614.

(*c*) Doe d. Hitchings v. Lewis, 1 Burr. 619.

(*d*) As to proceedings in equity under this statute, see O'Connor v. Spaight, 1 Sch. and Lef. 305. Beasley v. Darcy, 2 Sch. and Lef. 403, (n. b). O'Mahony v. Dickson, 2 Sch. and Lef. 400.

(*e*) Doe d. West v. Davis, 7 East, 362. Doe d. Harris v. Masters, 2 Barn. and Cres. 490.

(*f*) Goodtitle v. Holdfast, 2 Str. 900, appears to have been decided before the statute passed into a law.

(*g*) Doe d. Harcourt v. Roe, 4 Taunt. 883. Tidd's Pr. 590, 8th edit.; and see Doe d. Whitfield v. Roe, 3 Taunt. 402.

(*h*) Goodright d. Stevenson v. Noright, 2 W. Bl. 746.

(*i*) Pure d. Wethers v. Sturdy, B. N. P. 97; and see Lovat v. Lord Ranelagh, 3 Ves. and B. 30.

(*k*) Bracebridge v. Buckley, 2 Price, 200. Hill v. Barclay, 16 Ves. 402. Wadman v. Calcraft, 10 Ves. 67.

(*l*) Relfe v. Harris, cited 2 Price, 210, note; and *ibid.* 215.

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Lord Ellenborough appears to have been of opinion, that the remedy given to the tenant by the 4th sec. of the statute, 4 Geo. 2, c. 28, is not confined to cases where there is six months rent arrear, *and no sufficient distress is to be found on the premises.* (*a*)

3. *The remedy given to a mortgagee.* By the second section of the statute, the right of a mortgagee not in possession shall not be barred, provided within six calendar months after execution executed, he pay the rent arrear and all costs and damages sustained by the lessor, and perform the covenants and agreements of the lessee. It has also been decided that a mortgagee is entitled to the same relief as the lessee. (*b*)

How saved or dispensed with.

A forfeiture for non-payment of rent may be saved, if the tenant is on the land, ready to pay the rent at the time when, and place where it is demanded by the lessor (*c*), and if the tenant meets the lessor either on or off the land, at any time of the last day of payment, and tenders the rent, it is sufficient to save the forfeiture, for the law leans against forfeitures. (*d*)

Waiver.

Where a forfeiture has been incurred, either by non-payment of rent, or non-performance of a covenant, where there is a condition of re-entry reserved in such case, the forfeiture may in some instances be waived by certain acts of the lessor recognising a subsisting tenancy. But as a *voidable* lease only, and not a *void* lease, can be set up again by such acts, it will be necessary to state in what cases a lease becomes actually void, and in what only voidable.

A lease for *lives* becomes *voidable* only, on a forfeiture incurred, though the words of the condition should be, "that the lease shall be void" (*e*); for an estate which commences by livery, can only be determined by entry, or what is tantamount thereto, by an ejectment. (*f*) Such a lease, therefore, is capable of being affirmed.

In case of a lease for *years*, there is a distinction arising out of the form of words used in the condition. If the words be, that in case of non-payment of rent, &c. the lease shall be *null and*

(*a*) Roe d. West v. Davis, 7 East, 366; but it was unnecessary to decide this point in that case.

(*b*) Doe d. Whitfield v. Roe, 3 Taunt. 402.

(*c*) See *ante*, p. 535.

(*d*) Co. Litt. 201, b. 202, a. 1 Saund. 287, notes, 5th edit.

(*e*) Browning v. Beston, Plowd. 135, 136. 1 Saund. 287, d, notes, 5th edit.

(*f*) But such an estate may be determined by the ceasing of the estate of the lessor, or by a conditional limitation, 2 Prest. Shep. Touch. 284.

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On forfeiture.

void, and the forfeiture is incurred, it was formerly held that the lease was absolutely determined, and could not be set up again by acceptance of rent due after the breach of the condition, or by any other act (*a*); but this doctrine has lately been qualified, and it is now decided, that though the words of the proviso be "that the lease shall be deemed null and void to all intents and purposes," yet that the true construction of such a proviso is, that the lease shall be *voidable* only at the option of the lessor. (*b*) And in a lease for years, if the words of the proviso be that on non-payment of rent, &c. "it shall be lawful for the lessor to re-enter," the lease is only voidable, and therefore capable of being affirmed. (*c*)

Where the lease is rendered voidable by a forfeiture, the forfeiture may be waived, and the lease affirmed by various positive acts of the lessor, but merely lying by and witnessing a forfeiture, will not be deemed a waiver (*d*); nor will the waiver of one forfeiture be construed to be a waiver of another forfeiture subsequently accruing under the same condition. (*e*) The most usual waiver of a forfeiture, is the acceptance of rent accruing due since the breach of the condition (*f*), but to constitute such a waiver, the lessor must have notice of the forfeiture, which is a material and issuable fact. (*g*) So if the condition is that the lessee shall not assign, and he assigns, and the lessor accepts rent from the assignee, it is a waiver of the forfeiture. (*h*)

At common law where there is a condition of re-entry for non-payment of rent, and a forfeiture is incurred, if the lessor distrains for the same rent, in respect of which the forfeiture accrued, it is a waiver, for he thereby admits the continuance of the lease, because at common law no distress can be made after the lease is determined (*i*), but now by statute 8 Anne, c. 14, s. 6,

(*a*) Co. Litt. 215, a. Goodright d. Walter v. Davids, Cowp. 804. 1 Saund. 287, d, notes. Shep. Touchs. 284.

(*b*) Doe d. Bryan v. Bancks, 4 Barn. and A. 401; and see Read v. Farr, H. 57. G. 3, K. B.; cited 1 Saund. 287, d, new notes. 2 Chitty's Rep. 247. *Semb.* S. C.

(*c*) Browning v. Beston, Plowd. 133. Co. Litt. 215, a. Pennant's case, 3 Rep. 64, a, b, 65, a, b. Goodright d. Walter v. Davids, Cowp. 804.

(*d*) Doe d. Sheppard v. Allen, 3 Taunt. 78.

(*e*) Doe d. Boscawen v. Bliss, 4 Taunt. 735; and see Fryett d. Harris v. Jeffreys, 1 Esp. N. P. C. 393.

(*f*) Goodright d. Walter v. Davids, Cowp. 804.

(*g*) *Ibid.* Roe v. Harrison, 2 T. R. 430, 431. Pennant's case, 3 Rep. 64, b.

(*h*) Whitchcot v. Fox, Cro. Jac. 398.

(*i*) Pennant's case, 3 Rep. 64, b.

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On forfeiture.

7, a lessor may distrain within six calendar months, after the determination of a lease for life, years, or at will, if the lessor's title or interest, and the possession of the tenant from whom such rent became due, be continuing. (*a*) Where a lease contained a clause of re-entry, in case the rent should be in arrear twenty-one days, and there should be no sufficient distress, Lord Ellenborough, C. J. held that the landlord having distrained within the twenty-one days, but continued in possession after, did not waive his right of re-entry. (*b*) It has been decided that the lessor does not waive his right of re-entry, by taking an insufficient distress for the rent, by the non-payment of which the lease became forfeited. (*c*)

In ejectment on a proviso of re-entry for a forfeiture, it has been held that the lessor bringing an action of covenant for rent subsequent to the time of the demise laid in the declaration in ejectment, is a waiver of the forfeiture. (*d*)

Where a lease contained a general covenant to repair, and also a covenant to repair upon three months' notice, Lord Ellenborough, C. J. held that the landlord by giving notice, had not waived his right of re-entry for the breach of the general covenant. (*e*)

In some cases the *condition* itself may be dispensed with, so that no forfeiture can afterwards accrue, as where the condition of re-entry is "in case the lessee or his assigns shall assign without licence," and the lessor licences the lessee to assign any part, it is a dispensation of the whole condition, and the lessee, or his assignee, may assign all the residue without licence. (*f*)

Lord of a manor.

It has been already stated that an action of ejectment will lie for a manor. (*g*) The lord of a manor may also bring ejectment on a forfeiture of a copyhold estate by one of his copyholders (*h*), and this is his only remedy for waste committed by a copyholder, for as a copyholder is tenant at will, he is not within the

(*a*) See 1 Saund. 288, notes, 5th edit.

(*b*) Doe d. Taylor v. Johnson, 1 Stark. N. P. C. 411.

(*c*) Brewer d. Ld. Onslow v. Eaton; cited 6 T. R. 220.

(*d*) Roe d. Crompton v. Minshal, Bul. N. P. 96. By another report of this case it appears, that the defendant paid the amount of the rent into court, which was said to be equivalent to acceptance. Selw. N. P. 677, 4th edit.

(*e*) Roe d. Goatly v. Paine, 2 Campb. N. P. C. 520.

(*f*) Dumpor's case, 4 Rep. 119, 120. 1 Saund. 288, notes. *Ante*, p. 435.

(*g*) *Ante*, p. 486.

(*h*) What constitutes a forfeiture, see 1 Watk. Copyh. 324 to 340, 2nd edit. Com. Dig. Copyh. (M. 3,) (M. 4).

statute of Gloucester, and no action of waste, therefore, can be maintained against him (*a*); nor has the lord any remedy in equity. (*b*) Title.

Of particular persons.

The lord, and not the copyholder in remainder, is entitled to enter for the forfeiture, and therefore the lord may maintain ejectment, although there is an intermediate copyhold estate in remainder. (*c*) But where the reversion of a copyhold was granted by the lord to commence after the *forfeiture*, or other determination of the particular estate, it was held that the grantee of the reversion might enter on a forfeiture committed. (*d*)

He who is *dominus pro tempore*, may take advantage of a forfeiture committed during his own time (*e*), and the grantee of the freehold of the copyhold, or his lessee, may also take advantage of a forfeiture. (*f*) The rule that no one but the *dominus pro tempore* can take advantage of a forfeiture, is subject to some exceptions. Thus if there be tenant for life of a manor, remainder in fee, and a copyholder commits waste, and the tenant for life dies before entry, he in remainder may enter for the forfeiture, for he had an interest in the manor at the time of the forfeiture committed, though not a present capacity to bring an action (*g*), and so if a copyholder holding of a manor belonging to a bishoprick, commits a forfeiture by felling timber during the vacancy of the see, the succeeding bishop may bring ejectment for such forfeiture. (*h*) *Dominus pro tempore.*

If the act of forfeiture was such as to determine the customary estate, as if a copyholder makes a feoffment in fee, it seems that the heir of the lord in whose time it occurred, is entitled to take advantage of such forfeiture. (*i*) Heir.

(*a*) *Ante*, p. 113. Dench v. Bampton, 4 Ves. 700.

(*b*) *Ibid.* Nor will equity relieve a copyholder tenant for life who commits wilful waste. Thomas v. Porter, 1 Ch. Ca. 96. Pr. Ch. 547; but see Amb. 511. 1 Fonbl. Eq. 396.

(*c*) Margaret Podger's case, 9 Rep. 107, a. Gilb. Ten. 244. 1 Watk. Copyh. 341, 2nd edit. Doe d. Folkes v. Clements, 2 M. and S. 68.

(*d*) Strode v. Dennison, 3 Lev. 94. T. Jones, 189, S. C. Com. Dig. Copyh. (M. 6).

(*e*) Coke Copyh. S. 60. 1 Watk. Copyh. 342, 2nd edit. Com Dig. Copyh. (M. 6).

(*f*) Co. Copyh. S. 60. Moor, 393. Vin. Ab. Copyh. (T. c).

(*g*) Co. Copyh. S. 60. Gilb. Ten. 334. 1 Watk. Copyh. 343, 2nd edit. See *ante*, p. 107; but see Lady Montague's case, Cro. Jac. 301.

(*h*) Read v. Allen, Bull. N. P. 107. See *ante*, p. 108.

(*i*) Com. Dig. Copyh. (M. 6). 1 Lutw. 801. Cornwallis v. Hammond, Palmer, 416. Latch, 226, S. C. Doe d. Tarrant v. Hellier, 3 T. R. 173. Suppl. to Co. Copyh. S. 11.

Title.

Of particular persons.

But the alienee or lessee of a manor cannot enter for a forfeiture incurred before his own time. (*a*)

The lord cannot take advantage of a forfeiture, if he has dispensed with it, as by acceptance of rent with notice of the forfeiture (*b*); so if the act has been done with the licence of the lord, express or implied, it is no forfeiture.

It is not necessary that any presentment of the forfeiture should be made, or that the lord should enter or seise before bringing an ejectment for the forfeiture. (*c*)

It seems that the statute of limitations will run against the lord in case of a forfeiture of a copyhold. (*d*)

Mortgagee.

A mortgagee, or his assignee, who has the legal estate, may maintain ejectment. (*e*) If there are two several mortgagees, one of whom has got the legal estate, he is entitled to recover in ejectment against the other mortgagee. (*f*)

Where leases have been granted by the mortgagor previously to the mortgage, and such leases are still subsisting, the mortgagee cannot maintain ejectment before the determination of such leases (*g*); but a lease made by the mortgagor after the mortgage, will not prevent the mortgagee from bringing ejectment (*h*), though such lease was made in the time of the original mortgagee, and before the assignment of the mortgage to the lessor of the plaintiff. (*i*)

Parson.

A parson after induction may maintain ejectment for the glebe lands, &c. (*k*), and he may recover against his own lessee, on the ground of the lease of the rectory being avoided, on account of his own non-residence, by force of the statute 13 Eliz. c. 20. (*l*)

(*a*) Coke Copyh. S. 60. Penn v. Merrivall, Owen, 63. Cornwallis's case, 2 Vent. 39. Anon. 4 Leon. 223. See Doe d. Matthews v. Smart, 12 East, 444.

(*b*) Com. Dig. Copyh. (M. 8). 1 Watk. Copyh. 349 to 353, 2nd edit. Vin. Ab. Copyh. (A. d).

(*c*) Bull. N. P. 107.

(*d*) Doe d. Tarrant v. Hellier, 3 T. R. 172, 3.

(*e*) Smartle v. Williams, 1 Salk. 245. 3 Lev. 387, S. C.

(*f*) Goodtitle d. Norris v. Morgan, 1 T. R. 755.

(*g*) Doe d. Da Costa, v. Wharton, 8 T. R. 2.

(*h*) Keech d. Warne v. Hall, Dougl. 21. Birch v. Wright, 1 T. R. 383.

(*i*) Thunder d. Weaver v. Belcher, 3 East, 449. As to staying proceedings under stat. 7 Geo. 2, c. 20, in actions by mortgagees, see *post*.

(*k*) See *post*, in "Evidence."

(*l*) Frogmorton d. Fleming v. Scott, 2 East, 467.

Title.

Of particular persons.

A parson may maintain ejectment against a party in possession of the glebe lands, though the current year of a tenancy from year to year, created by his predecessor, is unexpired. (*a*)

Personal representative.

A personal representative of a termor may maintain ejectment, whether the testator or intestate had a lease for years, or from year to year, and whether the ouster was before or after his death. (*b*) Where a term is bequeathed to an executor, he will take it as executor, and not as legatee, until he assents to take it as legatee (*c*), and one of several executors may assent to a bequest to himself. (*d*)

Tithe owner.

The statute 32 Hen. 8, c. 7, s. 7, has put tithes in the hands of lay-impropriators, or which are admitted to be or abide in temporal hands, upon the same footing with corporeal hereditaments, turning them as it were into lands and tenements, and realizing them (*e*), so that an ejectment may now be maintained for them. (*f*) It has been already stated, that ejectment only lies against a party claiming title, and not against those who merely refuse to set out their tithe, and where the tithe is taken in kind, and not where an annual sum is paid in lieu. (*g*)

Of the ancient practice, and when necessary.

Where an ejectment is brought in an inferior court, which has not the power of framing a rule to confess lease entry and ouster, or of enforcing obedience to such a rule (*h*), the claimant must proceed according to the ancient practice in this action, by actually sealing a lease upon the premises to a real person, who is ousted by a real defendant, against whom the ejectment must be

(*a*) Doe d. Kerby v. Carter, 1 R. and M. 237.

(*b*) Slade's case, 4 Rep. 95, a. Moreton's case, 1 Vent. 30. Doe d. Shore v. Porter, 3 T. R. 13.

(*c*) Young v. Holmes, 1 Stra. 70. Com. Dig. Administration, (C. 5). What constitutes an assent, see 1 Saund. 279, d, (n,) 5th edition. Doe v. Sturges, 7 Taunt. 217.

(*d*) Townson v. Tickell, 3 B. and A. 40.

(*e*) Bally v. Wells, 3 Wils. 30. Wilmot's cases and opinions, 347, S. C. Co. Litt. 159, a. 2 Saund. 305, (n,) 5th edit. Gilb. Eject. 65, 2nd edit.

(*f*) Priest v. Wood, Cro. Car. 301. Harpur's case, 11 Rep. 25, b. Camell v. Clavering, 2 Ld. Raym. 789.

(*g*) *Ante*, p. 487. Doe d. Brierly v. Palmer, 16 East, 53. Gilb. Eject. 65, 2nd edit.

(*h*) R. v. Mayor of Bristow, 1 Keb. 690. Sherman v. Cocke, 1 Keb. 795. Gilb. Eject. 38, 2nd edit. Anon. Comb. 208.

Of the ancient practice, and when necessary.

brought.(a) So where the possession is vacant, and there is no tenant upon whom the declaration and notice can be served, the claimant must proceed according to the ancient practice.

Vacant possession.

Where the premises are wholly unoccupied, it is not necessary for the claimant, who has the right of possession, to proceed by ejectment, for he may enter upon the premises without process of law, and if trespass be brought against him, he may justify in a plea of *lib. ten.* if he be the owner of the freehold.(b) A tenant having omitted to deliver up possession when his term had expired by a notice to quit, the landlord, at a time when nobody was in the house, broke open the door with a crow bar, and resumed possession, some little furniture being still in the house. The tenant having obtained a verdict in trespass against the landlord for this entry, the court granted a new trial, holding that the landlord might enter in such case.(c)

Ejectment cannot be maintained, as on a vacant possession, where there is any thing left by the tenant on the premises, however trifling, for almost any matter will suffice to prevent a vacant possession(d), as if the tenant leave beer in a cellar, or hay in a barn(e); and in case of ground on which there is no house or building, if it be known where the tenant lives, the lessor of the plaintiff cannot proceed as on a vacant possession.(f)

The mode of proceeding in ejectment on a vacant possession, is as follows. A lease for years being previously prepared, and when necessary, a power of attorney executed, the party claiming title, or his attorney, enters upon the premises before the essoign day of the term, and there seals and delivers the lease to the lessee, who is usually some friend of the lessor, and at the same time delivers him the possession; but an attorney cannot be lessee.(g) The lessee remains on the premises until some third person enters thereon by previous agreement, and turns him out of possession, upon which a declaration in ejectment, which has been previously prepared, is delivered on the premises to the ejector, founded upon the demise contained in the lease.

(a) Adams Eject. 173, 2nd edit.

(b) Taunton v. Costar, 7 T. R. 431. The landlord may also avail himself of the remedy given him by the statutes 11 G. 2, c. 19, s. 16, and 57 G. 3, c. 52. *Ex parte* Pilton, 1 B. and A. 369.

(c) Turner v. Meymott, 1 Bingh. 158.

(d) *Per* Dampier, J. Doe d. Lowe v. Roe, 2 Chitty's R. 177.

(e) Savage v. Dent, 2 Str. 1064. Bul. N. P. 97, S. C.

(f) *Ibid.*

(g) R. M. 1654, S. 1 K. B. and C. B.

The declaration is similar to that in ordinary cases, except that the parties to it are real, and not fictitious persons; the lessee being made plaintiff on the demise of the lessor, and the ejector defendant. In lieu of the ordinary notice for the tenant to appear and be made defendant instead of the casual ejector, a notice is subscribed to the declaration, signed by the plaintiff's attorney, and addressed to the real defendant, informing him that unless he appear in court on the *first* day, or within the first *four* days in London or Middlesex, or in any other county, within the first *eight* days of the next term, at the suit of the plaintiff, and plead to the declaration, judgment will be entered against him by default. (*a*) In cases of vacant possession, no person claiming title will be let in to defend; but he that can first seal a lease upon the premises, must obtain possession. (*b*)

Of the ancient practice, and when necessary.

In moving for judgment against the defendant, in case of a vacant possession, in the King's Bench, an affidavit must be made of the sealing of the lease, entry of the lessee and ouster, and delivery of the copy of the declaration; so also of the execution of the power of attorney, if the entry was made by a third person; but in the Common Pleas such an affidavit is unnecessary, it being only requisite to give a rule to plead, as in common cases. (*c*)

Where ejectment is brought in an inferior court, it is usual to give the tenant in possession notice of the claimant's proceedings, but such notice need not be given until after the entry and execution of the lease. (*d*)

An ejectment may be removed from an inferior court, either by *habeas corpus* (*e*) or *certiorari*. (*f*) When removed, the tenant in possession is entitled to the same privilege of confessing lease entry and ouster, and defending the action, as if the plaintiff had originally declared in the superior court. (*g*)

It has been held to be a contempt of court, to assign the death of the nominal plaintiff for error, and in the same case a release by the nominal plaintiff in error, was said to be a contempt (*h*);

(*a*) Tidd's Pr. 532, 8th edit. Adams Eject. 174, 2nd edit.

(*b*) Barnes, 177.

(*c*) Tidd's Pr. 536, 8th edit. Adams Eject. 176, 2nd edit.; and see *post*.

(*d*) 1 Lill. Pr. Reg. 675.

(*e*) Allen v. Foreman, 1 Sid. 313. Gilb. Eject. 37, 2nd edit.

(*f*) Doe d. Sadler v. Dring, 1 B. and C. 253, overruling Highmore v. Barlow, Barnes, 421; and see Patterson v. Eades, 3 B. and C. 551.

(*g*) Gilb. Eject. 37, 2nd edit.

(*h*) Moore v. Goodright, 2 Str. 899. Anon. 1 Salk. 260.

Of the ancient practice, and when necessary.

so where the defendant in an ejectment on a vacant possession gave a warrant of attorney to confess judgment, the court set it aside. (*a*)

Of the declaration.

The declaration is the first process in ejectment (*b*), no writ being previously issued. It should regularly be entitled of the

Title.

term in which it is delivered, or if delivered in vacation, of the preceding term, and though the demise be laid after the first day of that term, yet no advantage can be taken of that circumstance, for the tenant, if he appear, will be compelled by the consent rule to accept a declaration entitled of a subsequent term. (*c*) Even if the declaration be not entitled of any term, it is good if the tenant has sufficient notice given him therein to appear to the action. (*d*)

By original or bill.

The declaration in the King's Bench is usually by original, though it may be by bill. In the Common Pleas it is by original, and in the Exchequer of Pleas by bill. (*e*) Where the declaration by original in the King's Bench states that the *tenant* instead of the *casual ejector* was attached to answer, and the name of the casual ejector is used in the rest of the declaration, a rule for judgment will be granted against the latter, but if the defendant should appear, the proceedings may be set aside for irregularity. (*f*)

Venue.

The venue in ejectment is local. (*g*)

Demise. When laid.

The demise must be laid after the title and right of entry of the lessor of the plaintiff accrued (*h*), and as the record in ejectment is evidence in an action for the mesne profits, it is usual to lay the day of the demise as far back as possible. (*i*) In ejectment on the demise of an heir at law, the demise was laid on the day on which the ancestor died, and it was held good (*k*); and so, as it seems, a posthumous son taking lands by way of remainder under the stat. 10 & 11 W. 3, c. 16, may lay the de-

(*a*) Hooper v. Dale, 1 Str. 531.
(*b*) Barnes, 186.
(*c*) Tidd. Pr. 519, 8th edit.
(*d*) Goodtitle d. Price v. Badtitle, MS. Adams Eject. 181, 2nd edit.; and see Goodtitle d. Ranger v. Roe, 2 Chitty's R. 172, Barnes, 186, as to a wrong term.
(*e*) Tidd's Pr. 520, 8th edit.
(*f*) Anon. 2 Chitty's R. 173.
(*g*) Anon. 6 Mod. 222. Mayor of Berwick v. Ewart, 2 W. Bl. 1070. Mosten v. Fabrigas, Cowp. 176.
(*h*) Bull. N. P. 105. Berrington v. Parkhurst, 2 Str. 1087.
(*i*) Bull. N. P. 87.
(*k*) Roe d. Wrangham v. Hersey, 3 Wils. 274.

mise from the day of his father's death. (*a*) Where an entry has been made to avoid a fine levied with proclamations, the demise must be laid after the entry. (*b*) Where a person comes lawfully into possession, as under a negociation for a purchase or a lease, ejectment cannot be maintained until such possession has been determined by demand or otherwise, and therefore the demise ought to be laid after the time of such demand (*c*); and so where there has been a tenancy at will, the demise cannot be laid on a day antecedent to the determination of the will (*d*), but this is said not to be necessary in an ejectment brought by a mortgagee against a mortgagor in possession, in which case, it is said, the demise may be laid on a day anterior to the actual determination of the will (*e*); but since a late decision (*f*), in which it was held that a tenancy subsists between the mortgagor and mortgagee, the above *dictum* may be doubted, and it will be prudent to lay the demise in such an action after a demand of possession. If a clause is inserted in the mortgage deed, as is now usual, that the mortgagor shall continue in possession until default is made in payment of the mortgage money, the demise ought to be laid subsequent to the time appointed for the payment. (*g*) In an ejectment brought by an assignee of a bankrupt or a copyholder, the manner in which the demise must be laid has been already stated. (*h*)

Of the declaration.

Where ejectment was brought on the demise of a corporation aggregate, it was formerly thought necessary for them to execute a power of attorney, authorising some person to enter upon the lands, and make a lease under seal, and that the declaration should state the demise to be under seal (*i*); but such a proceeding is not now required, nor need the demise in the declaration, as it seems, be stated to be by deed (*k*), nor if so stated need the

When by deed.

(*a*) Bull. N. P. 105.

(*b*) *Ante*, p. 497.

(*c*) Right d. Lewis v. Beard, 13 East, 210. See *ante*, p. 524.

(*d*) *Per* Buller, J. Birch v. Wright, 1 T. R. 383. Goodtitle d. Galloway v. Herbert, 4 T. R. 680.

(*e*) *Per* Buller, J. Birch v. Wright, 1 T. R. 383.

(*f*) Partridge v. Bere, 5 B. and A. 604.

(*g*) 2 Phill. Evid. 255, 6th edit.

(*h*) *Ante*, p. 509, 512. As to the demise in an action by a creditor of an insolvent after a conveyance to him by the clerk of the peace, pursuant to 41 G. 3, c. 70, s. 15, see Doe d. Whatley v. Telling, 2 East, 257.

(*i*) Gilb. Eject. 35, 2nd edit.

(*k*) Partridge v. Ball, 1 Ld. Raym. 136. Carth. 390, S. C. *after verdict*. Adams Eject. 190, 2nd edit.; but see Bull. N. P. 98.

Of the declaration.

deed be proved. (*a*) In ejectment for tithes, the demise not being stated to have been by deed, it was held bad after verdict (*b*), but this case was said by Holt, C. J. not to be law. (*c*) In a demise by an infant, it is not necessary to state a rent reserved. (*d*)

The interest of the plaintiff cannot be in any manner affected by the length of time stated in the declaration in ejectment, and therefore, though the lessor of the plaintiff be only tenant from year to year, the plaintiff may declare in ejectment upon a term for several years. (*e*)

The demise must be framed according to the legal interest of the lessors of the plaintiff. Thus, a joint demise by two persons is not supported by proving that they are entitled as tenant for life and remainderman, for the lease of the latter operates as a confirmation, and not as a lease. (*f*)

Jointenants and coparceners.

Jointenants and coparceners may either join or sever in demising. Upon a several demise from each, the portion belonging to him may be recovered, and, if several jointenants or coparceners join in the action, and declare upon the separate demises of each, the whole premises may be recovered. (*g*) The payment of an entire rent to the common agent of the lessors of the plaintiff is *primâ facie* evidence of their joint title. (*h*)

Tenants in common.

Tenants in common must make several demises in ejectment (*i*) for not being seised *per mie et per tout*, but each having a several moiety, a joint lease by them must operate as the several lease of each, and it is therefore incorrect to lay a joint demise, which imports a joint lease in law.

Party made lessor without authority.

Where a party is made a lessor of the plaintiff without his authority, he may, before appearance, move to have his name struck out of the declaration. (*k*) But when there was a demise

(*a*) Furley d. Mayor Cant. v. Wood, 1 Esp. N. P. C. 198.

(*b*) Swadling v. Piers, Cro. Jac. 613.

(*c*) Partridge v. Ball, 1 Ld. Raym. 136.

(*d*) Zouch v. Parsons, 3 Burr. 1806.

(*e*) Doe d. Shore v. Porter, 3 T. R. 13, 17. Bull. N. P. 106. As to enlarging the term, see *post*.

(*f*) Treport's case, 6 Rep. 15, a. Co. Litt. 45. a. Gilb. Eject. 85, 2nd edit.

(*g*) Doe d. Marsack v. Read, 12 East, 57. Doe d. Whayman v. Chaplin, 3 Taunt. 120. Doe d. Gill v. Pearson, 6 East, 173. Doe d. Lulham v. Fenn, 3 Campb. N. P. C. 190.

(*h*) Doe d. Clarke v. Grant, 12 East, 221.

(*i*) Heartherley v. Weston, 2 Wils. 232. Mantle v. Woolington, Cro. Jac. 166. Moore v. Fursden, 1 Shower, 342. Co. Litt. 200, a. Gilb. Eject. 85, 2nd edit.; but see what is said by Gibbs, Atty. Genl. *amicus curiæ*, 12 East, 61. 2 Phill. Evid. 218, 6th edit.

(*k*) Doe d. Shepherd v. Roe, 2 Chitty's Rep. 171.

by assignees of a bankrupt (without their authority) who had given up the property to the bankrupt, under whom the plaintiff claimed, the court refused to interfere, at the instance of the defendant. (*a*) Of the declaration.

When there exists any doubt as to the parties in whom the legal interest resides, or as to the time when the title of the lessors of the plaintiff accrued, it is usual to insert several demises in the declaration according to the circumstances of the case.

The parish where the lands are situated need not be named, though some place should be mentioned, and, if a place be mentioned generally, it will be intended to be a vill. Where the place at which the premises were situated was omitted, the court, after verdict, held that they might be intended to be situated at the place where the ouster was alleged. (*b*) But, where a parish, &c. is mentioned, the description must be correct, for a variance will be fatal. (*c*) However, where the premises were described as situate in the parish of A. and B., and at the trial it appeared that some of the lands lay in the parish of A., and some in the parish of B., and that there was no parish of A. and B., and the plaintiff had a verdict, the court refused a rule for a new trial (*d*); so where they were described as lying in the parish of *Farnham*, and proved to be in the parish of *Farnham Royal*, it was held not to be a fatal variance, unless it could be proved that there were two Farnhams. (*e*) So also where the premises were described as in the parish of Westbury, and it was proved that there were two parishes of Westbury, viz. Westbury on Trym, and Westbury on Severn, this was held to be no variance. (*f*) Where the premises lie in different parishes it has been usual to enumerate the whole as lying in one parish, and to repeat the description of them as lying in the other parish, but it seems sufficient to enumerate them once only, and to describe them as situate in the parishes of A. and B., or in A. and B. respectively. (*g*) Situation of the premises.

The entry of the plaintiff upon the land is stated to be by vir- Entry.

(*a*) Doe d. Vine v. Figgins, 3 Taunt. 440.

(*b*) Goodright d. Smallwood v. Strother, 2 W. Bl. 706.

(*c*) Goodtitle d. Pinsent v. Lammiman, 2 Campb. N. P. C. 274.

(*d*) Goodtitle d. Bremridge v. Walter, 4 Taunt. 671.

(*e*) Doe d. Tollet v. Salter, 13 East, 9.

(*f*) Doe d. James v. Harris, 5 M. and S. 326.

(*g*) Adams Eject. 193, 2nd edit. 2 Chitty's Plead. 395.

Of the declaration.

tue of the demise, and it is not necessary, though it is usual, to allege a day. (*a*)

Ouster.

Where there are several demises on the same day, it is usual to lay only one entry and one ouster, but otherwise there should be as many entries and ousters as there are demises. (*b*) The ouster should regularly be laid after the lease and entry, but where the lease was stated to have been made, 6th Sept. 2 Jac. and the declaration alleged, that "afterwards, to wit on the 4th Sept. 2 Jac." the defendant ejected the plaintiff, the court, after verdict, rejected the words "4th Sept. 2 Jac." as repugnant. (*c*) It is not essential that the day of the ouster should be expressly mentioned, it is sufficient if it appears to be after the term commenced, and before action brought. (*d*)

Amending.

The declaration in ejectment may be amended in the day of the demise (*e*), but the court will not allow the day of the demise to be altered to a day subsequent to the day of serving the declaration. (*f*) It is now the practice to permit the plaintiff to add a new demise, if on the *same* title. (*g*) In a late case, a new count on a fresh demise was added on payment of costs after three terms had elapsed, and the roll had been made up and carried in. (*h*) So after judgment and writ of error brought, the declaration was amended by striking out the word "tenements." (*i*) So if the notice to appear be of a wrong term, it may be amended (*k*), and the courts will allow an amendment to be made in the name of the parish in which the premises are situated. (*l*)

The declaration may also be amended by enlarging the term. Thus the term was enlarged on payment of costs, though the cause was at issue, a special jury struck, and the parties had gone down to the assises before the mistake was discovered (*m*); and a similar amendment was allowed after a judgment in eject-

(*a*) Gilb. Eject. 77, 2nd edit.

(*b*) Tidd's Pr. 521, 8th edit.

(*c*) Adams v. Goose, Cro. Jac. 96. Bul. N. P. 106. Davis v. Purdy, Yelv. 182; and See Bynner v. Russel, 1 Bing. 23.

(*d*) Gilb. Eject. 77, 2nd edit.

(*e*) Doe d. Hardman v. Pilkington, 4 Burr. 2447. Doe d. Rumford v. Miller, MS. Adams Eject. 199, 2nd edit. 1 Chitty's R. 536, notes, S. C.

(*f*) Doe d. Foxlow v. Jeffries, MS. Adams Eject. 200.

(*g*) Tidd's Pr. 522, 8th edit.

(*h*) Doe d. Beaumont v. Armitage, 1 Dow. and R. 173. 2 Chitty's R. 302, S. C.

(*i*) Anon. 1 Ch. R. 537, notes.

(*k*) Doe d. Bass v. Roe, 7 T. R. 469.

(*l*) Doe d. O'Connel v. Porch, MS. Adams Eject. 201, 2nd edit.

(*m*) Roe d. Lee v. Ellis, 2 W. Bl. 940.

Of the declaration.

ment in Ireland affirmed, and a writ of error brought in the King's Bench in England (*a*); but where more than twenty years had elapsed from the time of the judgment obtained, and there had been two descents cast, the court refused to enlarge the term, in order to enable the lessor of the plaintiff to sue out a *sci. fa.* on the judgment (*b*), and it is incumbent on the party applying for leave to amend, to shew distinctly that no injustice will be done by granting the application. (*c*) The declaration in ejectment could not formerly have been amended by enlarging the term without consent, but afterwards such amendment was allowed without any consent. (*d*)

Notice to appear.

At the foot of the declaration a notice to appear is given; if by the casual ejector, for the tenant to appear, and be made defendant in his stead; if on the statute, 1 Geo. 4, c. 87, by the lessor of the plaintiff, for the tenant to appear and find bail, &c.; or in case of a vacant possession by the plaintiff's attorney, for the defendant to appear and plead to the action. (*e*) Where the notice, instead of being subscribed with the name of the casual ejector, was subscribed with that of the nominal plaintiff, the court of King's Bench refused to set aside the proceedings. (*f*) So where it was signed by the lessor of the plaintiff, the court granted a rule for judgment. (*g*)

Direction.

The notice should be addressed to the tenant in possession by name (*h*), and the Christian as well as the surname of the tenant in possession should be prefixed to the notice (*i*), but, where the defendant's name was abbreviated (John B. Jones, instead of John Benjamin), it was held sufficient. (*k*) Where there are several tenants, it is usual to prefix all their names to the notice, which renders the affidavit of service more simple, but it appears to be sufficient to prefix the name of each individual tenant to the declaration with which he is served. (*l*) In the Common

(*a*) Vicars v. Haydon, Cowp. 841.

(*b*) Doe d. Reynell v. Tuckett, 2 Barn. and A. 773. 1 Chitty's R. 535, S. C.

(*c*) Bradney v. Hasselden, 1 B. and C. 121. 2 Dowl. and Ryl. 227, S. C.

(*d*) Oates v. Shepherd, 2 Str. 1272. Tidd's Pr. 522, 8th edit.

(*e*) Tidd's Pr. 523, 8th edit.

(*f*) Hazlewood d. Price v. Thatcher, 3 T. R. 351, overruling Barnes, 172.

(*g*) Goodtitle d. Duke of Norfolk v. Notitle, 5 B. and A. 849.

(*h*) Doe v. Badtitle, 1 Chitty's R. 215. Doe d. Governors, &c. v. Roe, 1 B. Moore, 113; but see Doe d. Pearson v. Roe, 5 B. Moore, 73.

(*i*) Doe v. Roe, 1 Chitty's R. 573.

(*k*) *Ibid.* note (*a*).

(*l*) Roe d. Burlton v. Roe, 7 T. R. 477.

Of the declaration.

Pleas, where several tenants had been served with a copy of the declaration, but the notice was not addressed to any of them, judgment was allowed to be entered against the casual ejector.(*a*)

Notice to appear.

It may here be remarked, that where several ejectments are brought for the *same* premises upon the *same* demise, the court on motion, or a judge at chambers, will order them to be consolidated. (*b*)

When to appear.

When the premises are situated in London or Middlesex, the notice should require the tenant in possession to appear on the first day in full term, (not the essoign day,) or within the first four days of the next term. (*c*)

Where the premises do not lie in London or Middlesex, the notice should be to appear in the next term after the delivery of the declaration, whether it be an issuable term or not. (*d*)

Where the notice in a town cause was to appear not on the first day, but in the *beginning* of the next term, the court granted a rule *nisi* for judgment against the casual ejector (*e*), but, where the notice was to appear "on the morrow of the Holy Trinity," and judgment had been signed, the court set it aside. (*f*) Where the notice had been given by mistake for Hilary instead of Trinity term, and the tenant in possession was afterwards informed of the mistake, the court granted a rule *nisi* for judgment against the casual ejector. (*g*) If the notice to appear be of a wrong term, it has been already stated, that it may be amended. (*h*)

Where to appear.

In the King's Bench by bill, the notice should require the tenant to appear in His Majesty's Court of King's Bench at Westminster, or by original, wheresoever His Majesty shall then be in England; but where by original, the notice ran in the form appropriate to the proceeding by bill, it was held sufficient. (*i*) In the Common Pleas the notice is to appear in His Majesty's Court

(*a*) Doe d. Pearson v. Roe, 5 B. Moore, 73; but see Doe v. Roe, 1 Chitty's R. 573.

(*b*) Barnes, 176. Tidd's Pr. 666, 8th edit.

(*c*) Holdfast v. Freeman, 2 Str. 1049. Tidd's Pr. 524, 8th edit.

(*d*) Tidd's Pr. 524, 8th edit.; and see Rules of K. B. E. 2 Geo. 4. 4 B. and A. 539. C. P. 2 Brod. and B. 705. Exch. 9 Price, 298.

(*e*) Thredder v. Travis, Barnes, 175.

(*f*) Doe d. Joynes v. Roe, MS. 2 Selw. N. P. 684, 4th edit.; and see Lackland d. Dowling v. Badland, 8 B. Moore, 79.

(*g*) Anon. 2 Chitty's R. 171. Doe v. Greaves, *ibid.* 172; and see Anon. MS. Adams Eject. 203, 2nd edit.

(*h*) *Ante*, p. 552.

(*i*) Doe d. Thomas v. Roe, 2 Chitty's R. 171.

of Common Bench, and in the Exchequer, in the office of Pleas of His Majesty's Court of Exchequer at Westminster. (*a*)

Of the declaration.

In ejectment by landlord against tenant, on the statute 1 Geo. 4, c. 87, a notice should be given to the tenant, requiring him to appear in the court in which the action is commenced, on the *first* day of the next term, there to be made defendant, and to find such bail, if ordered by the court, and for such purposes, as are specified in the statute. (*b*) The notice should be signed by the landlord himself, and not by the casual ejector, and should be a distinct notice, in addition to the ordinary one at the foot of the declaration. (*c*) The notice required by the statute may, it seems, either state the nature of the bail or undertaking, and the recognisance to be given and entered into by the tenant, and his sureties, specially, or may describe them generally with reference to the statute. (*d*)

Notice to appear.

Under stat. 1 G. 4, c. 87.

In case of a *vacant possession*, when the landlord proceeds according to the ancient practice (*e*), no notice is given by the casual ejector or landlord; but, instead thereof, a notice is subscribed to the declaration signed by the plaintiff's attorney, and addressed to the real defendant, informing him, that unless he appear in court on the *first* day, or within the first *four* days, in London or Middlesex, or in any other county within the first *eight* days of the next term at the suit of the plaintiff, and plead to the declaration, judgment will be entered against him by default. (*f*)

Vacant possession.

The declaration in ejectment must be personally served, by delivering a true copy of it, and of the notice or notices thereunder written, to the tenant in possession (*g*), or to his wife, or under certain circumstances to his servant, and at the same time reading over the notices, and explaining the intent and meaning of such service, or by acquainting the party served, generally, with the intent and meaning of the declaration and notices (*h*), but, though the declaration be not explained to the tenant, yet, if he

Service.

(*a*) Tidd's Pr. 524, 8th edit.
(*b*) Tidd's Pr. 525, 8th edit.
(*c*) Anon. 1 Dowl. and Ryl. 435, note.
(*d*) Tidd's Pr. 525, 8th edit.
(*e*) *Ante*, p. 546.
(*f*) Tidd's Pr. 525, 8th edit. Adams Eject. 342, 2nd edit.; but in many books of practice the notice is to appear and plead on the *first* day of next term in town causes; and in the next term, generally, in country causes. Imp. K. B. 656, 9th edit. 2 Sel. Pr. 213, 1st edit.
(*g*) As to the person who is to be considered tenant in possession. See Doe v. Staunton, 1 Chitty's R. 118. & *post*.
(*h*) Tidd's Pr. 525, 8th edit.

Of the declaration.

subsequently acknowledges that he has received it, and knows what it is, it will be sufficient. (*a*)

Service.

The mode of service where the lessor of the plaintiff proceeds on a right of re-entry under the stat. 4 Geo. 2, c. 28, (*b*) or on a vacant possession (*c*), has been already pointed out.

Time of service.

The declaration must be delivered before the essoign day of the term in which the notice to appear is given, otherwise judgment cannot be given till the next term (*d*), and, where the service of the declaration was before the essoign day, but the explanation not until after that day, it was held insufficient. (*e*) It seems, that service of the declaration on a Sunday is bad (*f*), but an acknowledgment on a Sunday of the receipt of the declaration is said to be good. (*g*)

Place of service.

The tenant himself may be served anywhere (*h*), but service on the wife should regularly be on the premises, or at her husband's dwelling house. (*i*) If the service on the wife be elsewhere, it should appear that she and her husband are living together as man and wife. (*k*) So service on a relation or servant of the tenant in possession should be upon the premises. (*l*)

Must be on tenant in possession.

The service of the declaration in ejectment must be upon the tenant in possession, or upon his wife; and under certain circumstances, it may be upon the servant, &c.

Several tenants.

Where there are *several* tenants in possession of *different* parts of the premises, a copy of the declaration must be served upon each of them to entitle the lessor of the plaintiff to judgment against the casual ejector for the whole (*m*), and so it seems that when a house is let out in lodgings, a copy of the declaration should be served on each lodger (*n*); but though the service

(*a*) Doe d. Thomson v. Roe, 2 Chitty's R. 186. Anon. *Ibid.* 184.

(*b*) *Ante*, p. 535.

(*c*) *Ante*, p. 546.

(*d*) Barnes, 172, 3.

(*e*) Doe v. Roe, 1 Dowl. and Ryl. 563.

(*f*) Morgan v. Johnson, 1 H. Bl. 628. Barnes, 309; but see Comb. 286, 462.

(*g*) Barnes, 183. *Sed vide* Goodtitle d. Mortimer v. Badtitle, 2 Dowl. and Ryl. 282. In Tidd's Pr. 526, 8th edit. it is said, that in the last case, the Sunday was the essoign day of the term.

(*h*) Savage v. Dent, 2 Str. 1064. Taylor v. Jefts, 11 Mod. 302.

(*i*) Doe d. Morland v. Bayliss, 6 T. R. 765. Doe d. Baddam v. Roe, 2 Bos. and Pul. 55. 1 Ch. R. 500, note. Tidd's Pr. 526, 8th edit.

(*k*) *Ibid.* Jenny d. Preston v. Catts, 1 Bos. & Pul. N. R. 308.

(*l*) Tidd's Pr. 527.

(*m*) Tidd's Pr. 526, 8th edit. Doe d. Bromley v. Roe, 1 Chitty's R. 141. Doe d. Elwood v. Roe, 3 Moore, 578. Bull. N. P. 98.

(*n*) Tidd's Pr. 526, 8th edit.

Of the declaration.

Service.

Jointenants.

on one of three tenants who hold severally is not sufficient, the court will grant judgment against the others, who have been properly served. (*a*)

But where several persons are in possession of the *same* premises as jointenants, service on one of them appears to be a sufficient service on all, so as to entitle the lessor of the plaintiff to a rule absolute against the casual ejector (*b*), though the practice of the King's Bench in such case formerly was, to grant a rule to shew cause, why service on one of the tenants should not be deemed good service on all of them. (*c*)

Churchwardens, &c.

There need not be in all cases an actual personal occupation of the premises to make a tenant in possession; thus in ejectment for a house, which was rented by the churchwardens and overseers of a parish, for the purpose of accommodating some of the parish poor, service of the declaration upon them was held sufficient, though they did not occupy the house otherwise than by placing the poor in it (*d*), and in ejectment for a chapel, the service may be upon the chapel wardens, or on the persons to whom the keys are entrusted. (*e*)

Tenant abroad.

Where the tenant in possession is abroad, the declaration may be served upon his wife. (*f*) So where the tenant resided abroad, and carried on his business by an agent who lived on the premises, service of the declaration on the agent, and fixing it up on the premises, was held sufficient. (*g*) But where the tenant had left this country, and resided abroad for the purpose of avoiding his creditors, and it appeared that a copy of the declaration had been delivered to a servant on the premises, who was left in charge of them, and another copy affixed to the outer door of the house, the court of Common Pleas held that this was insufficient. (*h*)

Or absconds.

If the tenant absconds, or keeps out of the way to avoid being served, a copy of the declaration should be delivered to a servant, relation, or other person on the premises, to whom the notice should be read over, and the meaning of the service ex-

(*a*) Doe d. Murphy v. Moore, 2 Chitty's Rep. 176.

(*b*) Tidd's Pr. 526. Doe d. Bromley v. Roe, 1 Chitty's R. 141. Doe d. Bailey v. Roe, 1 Bos. and Pul. 369. See also 4 T. R. 464. 7 East, 551; (cases of notices to quit). *Ante*, p. 532.

(*c*) Tidd's Pr. 527. 2 Chitty's Rep. 174, 5, 6.

(*d*) Barnes, 181.

(*e*) Run. Eject. 157, 2nd edit.

(*f*) Doe v. Roe, 1 Dowl. and Ryl. 514.

(*g*) Doe v. Roe, 4 B. and A. 653.

(*h*) Roe d. Fenwick v. Doe, 3 B. Moore, 576.

Of the declaration.

Service.

plained, and another copy should be affixed to the door, or some conspicuous part of the premises, and if it be made to appear to the satisfaction of the court, that the tenant absconded, or kept out of the way to avoid being served, the court on an affidavit of the facts, will grant a rule *nisi*, that such service shall be good service, and will direct in what manner the rule shall be served. (*a*)

Or is not to be found, and there is no one on the premises.

If neither the tenant nor his wife can be met with, and there is no one on the premises, upon whom the declaration can be served, a copy of it should be affixed on the most conspicuous part of the premises, and an application made to the court on an affidavit of the circumstances, that it may be deemed good service. (*b*) But it must appear, that due diligence has been used to serve the tenant; thus it is not sufficient for the person serving the declaration, to call at the tenant's house in the morning, and again in the evening, and not finding him at home to nail the copy of the declaration on the most conspicuous part of the premises (*c*); and in ejectment for a stable, a service of the declaration by nailing it on the door of the stable, no one being therein, and then going to the defendant's house, and informing him of what had been done, is insufficient. (*d*) The declaration should not only be affixed to the premises, but should be left there. (*e*)

Or is a lunatic.

Where the tenant is a lunatic, the declaration may be served upon the person who has the care of the lunatic's person, and the management of his affairs, though he is not a committee regularly appointed, and the court will grant a rule *nisi* for judgment, and the rule should be to show cause generally, and it is not necessary that it should be directed to any particular person. (*f*)

Or is confined by illness.

So where the tenant in possession is confined to his bed by illness, the declaration may be served upon the premises on his servant, to whom the notice should be read, and the intent of

(*a*) Barnes, 173, 188, 190, 192. Doe d. Neale v. Roe, 2 Wils. 263. Doe d. Batson v. Roe, 2 Chitty's R. 176. Doe d. Lowe v. Roe, *Ib.* 177. Anon. *Ib.* 177. Tidd's Pr. 530, 8th edit.

(*b*) Fenn d. Buckle v. Roe, 1 N. R. 293. Doe d. Hele v. Roe, 2 Chitty's R. 178. Tidd's Pr. 531; but see Roe d. Fenwick v. Doe, 3 B. Moore, 576.

(*c*) Anon. 1 Chitty's R. 505, note; and the other cases there collected.

(*d*) Doe d. Lovell v. Roe, 1 Chitty's R. 505.

(*e*) Doe d. Tarlay v. Roe, 1 Chitty's R. 506.

(*f*) Doe d. Ld. Aylesbury v. Roe, 2 Chitty's R. 183.

Of the declaration.

the service explained, and on such service the court will grant a rule *nisi*. (*a*)

Service.

Where the tenant in possession was dead, and a declaration addressed to the tenant in possession, or his personal representative, was served upon a servant who remained in possession of the premises, the court refused a rule for judgment against the casual ejector. (*b*) If the servant had refused to deliver up possession, he might have been treated as tenant in possession, and proceeded against regularly. (*c*)

Or dead.

Or refuses to accept declaration.

In case the tenant or his wife refuse to accept a copy of the declaration when tendered, the notice should be read and explained to them, and a copy of the declaration and notice left on the premises, or put through a window, &c. after which an application should be made to the court, on an affidavit of the circumstances, for a rule for judgment, or that it may be deemed good service. (*d*) Thus where the tenant refused to accept the declaration when tendered to him, but brought a gun, and swore he would shoot the person who tendered the declaration, if he did not get off his land, whereupon the declaration was laid on the ground, in the presence of the tenant and his man, whom the tenant ordered not to take it up, it being sworn that the tenant was acquainted with the contents of the declaration, the court granted a rule for judgment. (*e*) So where the declaration was tendered to the wife of the tenant in possession, and she was acquainted with the contents, but she refused to open the door of the house, and looked out at a parlour window, and the notice was read to her, after which the declaration was put in at the window, the service was held sufficient. (*f*) So after several ineffectual attempts to serve the tenant, who refused to see any one without knowing his message, a service upon the servant was held a sufficient service, upon which to ground a rule *nisi* for judgment. (*g*) So a rule *nisi* was granted where the

(*a*) Anon. 2 Chitty's R. 182; and see Doe v. Roe, 2 Dowl. and Ryl. 12. Tidd. Pr. 528, 8th edit.

(*b*) Doe d. Atkins v. Roe, 2 Chitty's R. 179; and see Doe d. Governors, &c. of St. Margaret's v. Roe, 1 B. Moore, 113.

(*c*) *Per* Holroyd, J. Doe d. Atkins v. Roe, 2 Chitty's R. 179.

(*d*) Tidd's Pr. 529, 8th edit.

(*e*) Barnes, 174.

(*f*) Barnes, 178. Wright d. Bayley v. Wrong, 2 Chitty's R. 185, rule *nisi* only; and see Doe d. Neale v. Roe, 2 Wils. 263, rule *nisi*.

(*g*) Doe d. Hervey v. Roe, 2 Price, 112.

Of the declaration.

servants refused to call their master, or to receive the declaration, saying they had orders to take no papers. (*a*)

Service.

On wife or other agent.

The service of the declaration may be upon the wife of the tenant in possession, provided it be upon the premises, or at the dwelling house of the husband, or if elsewhere, that the tenant in possession and she be living together as husband and wife (*b*), but the acknowledgment of the wife that she has received a copy of the declaration which was served upon her niece, is not, as it seems, sufficient (*c*); nor will a service upon the wife of one of two tenants in possession bind the other. (*d*)

Servant or relation.

If the tenant or his wife cannot be met with, service may be upon a relation or servant of the tenant in possession, or other person on the premises, to whom the notice should be read over and the declaration explained (*e*); and if the tenant afterwards acknowledges the receipt of the declaration, before the essoign day of the next term, such service will be sufficient (*f*); but without such an acknowledgment, the service will not be good. (*g*) Where the tenant in possession was confined to her room, and could not be seen, and the declaration was left with her daughter, who acknowledged before the essoign day, that she had read over the declaration to her mother, and explained the meaning of it to her, a rule *nisi* for judgment against the casual ejector was granted. (*h*)

A mere servant, who is in the ostensible occupation of premises, and who assumes the character of the tenant in possession, is liable to be made defendant, and his conduct is evidence to go to the jury, to presume that he is the tenant in possession, unless the fact be rebutted by other evidence. (*i*)

Service upon a person off the premises having charge of the

(*a*) Douglass v. ———, 1 Str. 575.

(*b*) *Ante*, p. 556.

(*c*) Goodtitle d. Read v. Badtitle, 1 Bos. and Pul. 384; but see Doe d. Ld. Stourton v. Hurst, 1 H. Bl. 644; and see Anon. 2 Ch. R. 182.

(*d*) Woodf. L. and T. 463.

(*e*) Anon. 2 Chitty's R. 182.

(*f*) Anon. 1 Salk. 255. Roe d. Hambrook v. Doe, 14 East, 441. Doe d. Tindale v. Roe, 2 Chitty's R. 180. Doe d. Macdougal v. Roe, 4 B. Moore, 20; but see 1 H. Bl. 644, as to acknowledgment before the essoign day.

(*g*) *Ibid.* Tidd's Pr. 527, 8th edit.; but after a service on the servant, an acknowledgment by the attorney of the tenant is sufficient for a rule *nisi*. Doe v. Snee, 2 D. and R. 5.

(*h*) Doe v. Roe, 2 Dowl. and Ryl. 12. Anon. 2 Chitty's R. 182.

(*i*) Doe d. James v. Staunton, 1 Chitty's R. 118. Gulliver v. Swift, 2 Kenyon, 511.

keys in order to let the house, has been holden to be insufficient. (*a*)

Of the declaration.

Service.

Attorney.

Where the declaration had been served upon an attorney, who represented himself to be the agent of the tenants in possession, and who desired the person serving it not to trouble the tenants, but to give it to him, and he would appear for them, the court granted a rule *nisi* for judgment (*b*); and where the tenant in possession was out of the way, and on reference to his attorney, the latter directed that the declaration should be sent by the twopenny post to the tenant's last place of abode, which was done accordingly, and the declaration was served on a person on the premises, and also on the attorney, the court granted a rule *nisi* for judgment (*c*); so where the defendant's attorney acknowledged that he had received the declaration from his client, a rule *nisi* was granted. (*d*)

Where the tenant resides abroad, but carries on his business by an agent, who lives on the premises, service of the declaration on such agent, and affixing it to the premises, has been held sufficient. (*e*)

Clerk of public body.

Where the declaration was served upon the clerk of a public body, appointed under the direction of an act of parliament, the court granted a rule *nisi* for judgment. (*f*)

Manager appointed by Court of Chancery.

Service upon a person appointed by the Court of Chancery, to manage an estate for an infant, has been held insufficient, as being nothing more than service on a gentleman's bailiff, although the estate consisted of a large wood, of which no tenant was in possession. (*g*)

Affidavit of service.

When the declaration in ejectment has been served, an affidavit of that fact should be made, upon which to ground an application to the court, for judgment against the casual ejector. This affidavit should regularly be made by the person who served the declaration (*h*); or in the Common Pleas by a person who saw the tenant in possession served, and heard the person who served him acquaint him with the intent and meaning

(*a*) Anon. 12 Mod. 313. See Roe d. Fenwick v. Doe, 3 B. Moore, 576.
(*b*) Anon. 2 Chitty's R. 181.
(*c*) Anon. 2 Chitty's R. 179.
(*d*) Anon. 2 Chitty's R. 187. Doe d. Teverell v. Snee, 2 Dowl. and Ryl. 5.
(*e*) Doe v. Roe, 4 B. and A. 653. *Ante*, p. 557.
(*f*) Anon. 2 Chitty's R. 181. See Doe v. Woodman, 8 East, 228.
(*g*) Goodtitle d. Roberts v. Badtitle, 1 Bos. and Pul. 385.
(*h*) Tidd's Pr. 533, 8th edit.

Of the declaration.

Affidavit of service.

of the declaration and notice. (*a*) The affidavit should be entitled in the court where it is sworn, and with the names of the nominal plaintiff on the demise of his lessor, or several demises of his lessors, against the casual ejector. (*b*) An affidavit entitled with the name of the real defendant, instead of the casual ejector, being insufficient (*c*); but inverting the order of the names of the lessors is not material. (*d*) The *jurat* must state the day on which it is sworn; if omitted, it should be amended, or an affidavit should be produced on the part of the commissioner, as to his recollection of the day when it was sworn. (*e*) The affidavit must state all the circumstances necessary to constitute a perfect service, or to induce the court to grant a rule *nisi*. The requisite allegations of the affidavit may therefore be in general gathered from what has been already said in treating of the service of the declaration. It may, however, be proper again briefly to mention those requisites.

The affidavit should state that the notice was read over to the tenant, and the intent and meaning of the service explained to him, or generally, that the deponent acquainted him with the intent and meaning of the declaration and notice (*f*), but if it state that the tenant subsequently acknowledged that he had received the declaration, and knew what it was, this will be sufficient. (*g*) The time of the service should be stated, in order to shew that it was before the essoign day of the term. (*h*)

Place of service.

The affidavit must state that the service was on the premises where such service is necessary. (*i*)

Tenant in possession.

Where the service is upon the tenant, it must appear by the affidavit that the person served is *tenant in possession;* an affidavit of service on the tenant, without shewing him to be in possession (*k*); or on the *person in possession, or appearing to be in possession,* or upon a person whom the deponent *believes to be tenant in possession,* is insufficient. (*l*)

(*a*) Doe d. Wanklen v. Badtitle, 2 Bos. and Pul. 120.

(*b*) Tidd's Pr. 533, 8th edit.

(*c*) Anon. 2 Chitty's R. 181.

(*d*) Doe d. Worthington v. Butcher, 2 Chitty's R. 174.

(*e*) Doe v. Roe, 1 Chitty's R. 228.

(*f*) *Ante*, p. 555. See the form, Adams Eject. 349, 2nd edit. If the affidavit only state, that the notice was *read*, it is not sufficient. Doe d. Whitfield v. Roe, MS. Adams Eject. 214. 2nd edit.

(*g*) Doe d. Thompson v. Roe, 2 Chitty's R. 186, and see Anon. 2 Chitty's R. 184; and *ante*, p. 556.

(*h*) Tidd's Pr. 534, 8th edit. *Ante*, p. 556.

(*i*) See *ante*, p. 560.

(*k*) Doe v. Roe, 1 Chitty's R. 575.

(*l*) *Ibid.* Doe d. Robinson v. Roe, Tidd's Pr. 534. Doe d. Walker v. Roe, 1 Price, 399.

Of the declaration.

When the declaration has been served upon several tenants in possession of *different* parts of the premises (*a*), there should be one or more affidavits stating the service on each of them. If they were all served by one person on the same day, a single affidavit of service is sufficient, stating generally that the deponent personally served A, B, C, D, &c. tenants in possession, &c. but otherwise there should be several affidavits stating the service on each particular tenant. (*b*)

Affidavit of service.

Jointenants.

Where the declaration has been served on one of several persons in possession of the same premises as jointenants (*c*), the affidavit must state that they are *all* tenants in possession (*d*), and it seems not to be necessary to name them *jointenants* in the affidavit, as it will be so intended. (*e*)

Tenant abroad.

When the tenant is abroad, the affidavit should state a service upon his wife in the usual manner (*f*), or upon his agents, and that a copy was affixed to the premises. (*g*)

Or absconded.

In what manner the service should be made when the tenant absconds has been already stated. (*h*) It must be sworn in the affidavit, that diligent inquiry has been made (*i*), and that the deponent verily believes that the tenant has absconded or keeps out of the way to avoid being served with a declaration. (*k*)

Or is not to be found, and there is no one on the premises.

When the tenant or his wife cannot be found, and there is no one on the premises, it has been stated, that a copy of the declaration should be affixed on the most conspicuous part of the premises. (*l*) In addition to these circumstances the affidavit of service should state that the declaration was *left* as well as affixed. (*m*)

Affidavit of service on wife.

When the wife of the tenant in possession is served, it must appear in the affidavit that she was his wife, or at least that the party believed her to be so. (*n*) An affidavit of the service of the declaration upon a *woman* on the premises, who represented herself to be the wife of the tenant in possession, without adding,

(*a*) *Ante*, p. 556.
(*b*) Tidd's Pr. 535, 8th edit.
(*c*) *Ante*, p. 557.
(*d*) Doe d. Bromley v. Roe, 1 Chitty's R. 141.
(*e*) Right v. Wrong, 2 Chitty's R. 175. Doe d. Bailey v. Roe, 1 Bos. and Pul. 369.
(*f*) *Ante*, p. 557, note (*f*).
(*g*) *Ante*, p. 557, note (*g*).
(*h*) *Ante*, p. 557.
(*i*) Tidd's Pr. 536, 8th edit.
(*k*) Doed. Tarluy v. Roe, 1 Chitty's R. 506.
(*l*) *Ante*, p. 558.
(*m*) Doe d. Tarluy v. Roe, 1 Chitty's R. 506.
(*n*) Barnes, 194. Tidd's Pr. 534, 8th edit.

Of the declaration.

Affidavit of service.

that the deponent believed her to be so, is insufficient.(a) An affidavit of service upon A. B., tenant in possession, *or* C. his wife, is not sufficient, it not being certain as to either. (b) So an affidavit, stating a service upon the wives of A. and B., *who or one of them* were tenants in possession. (c) It must appear that the wife was served on the premises, or at the dwelling house of the husband, or that she and her husband were living together as man and wife (d), and, in the King's Bench, this must appear by the affidavit, on which the rule for judgment is originally moved for (e), but, in the Common Pleas, where it was not sworn that the wife lived with the husband, the court granted a rule for judgment, provided a supplemental affidavit was produced to that effect. (f) It is sufficient if the affidavit state a service upon the wife on the premises, though it do not expressly state that the husband is tenant in possession, provided that fact can be collected by necessary inference. (g)

On stat. 4 G. 2, c. 28.

When the premises are *deserted* by the tenant, and the landlord proceeds on the statute 4 Geo. 2, c. 28, the affidavit should state that a copy of the declaration and notice was affixed upon the door of the messuage, or some notorious part of the premises, there being no person in possession upon whom the declaration could be legally served; that half a year's rent was then due from the late tenant, and no sufficient distress to be found on the premises to countervail the same; that the late tenant held the premises by virtue of a lease from the lessor of the plaintiff, and that a clause of re-entry is contained therein for non-payment thereof. (h) If one part of the premises be vacant, and the other in the occupation of a tenant, it is sufficient, if the affidavit state that a copy of the declaration was served on the tenant who occupied the one part, and that another copy was affixed on the door of that part which was vacant. (i)

Vacant possession.

In case of a *vacant possession* the affidavit to move for judgment in the King's Bench should state the entry of the lessor of the plaintiff, and his sealing a lease on the premises, the entry of

(a) Doe d. Simmons v. Roe, 1 Chitty's R. 228.
(b) Barnes, 178.
(c) Barnes, 174, 5.
(d) *Ante*, p. 556.
(e) Goodtitle v. Badtitle, 1 Chitty's R. 499.
(f) Jenny d. Preston v. Cutts, 1 Bos. and Pul. N. R. 308.
(g) Anon. 1 Chitty's R. 500, note.
(h) Tidd's Pr. 336, 8th edit. *Ante*, p. 535.
(i) Doe d. Evans v. Roe, 4 B. Moore, 469.

the lessee, and his ouster by the defendant, with the delivery to the latter of a copy of the declaration in ejectment. An affidavit should also be made of the execution of the power of attorney, if the entry was made by a third person. But, in the Common Pleas, an affidavit is unnecessary, it being sufficient in that court for the plaintiff to give a rule to plead, as in common cases, and, at the expiration of the time for pleading, if there be no appearance and plea, he signs judgment as a matter of course. (*a*)

Of the declaration.

Affidavit of service.

In the King's Bench, if the affidavit of service be defective, no supplemental affidavit will be permitted, but it seems to be otherwise in the Common Pleas. (*b*)

The motion for judgment against the casual ejector is in ordinary cases a motion of course, requiring only the signature of a counsel or serjeant, and when the motion paper is signed, it should be taken by the plaintiff's attorney to the clerk of the rules in the King's Bench, or to the secondary in the Common Pleas, who will draw up the rule. (*c*) In cases, however, in which the declaration has not been served in the usual manner, the motion should be made in court, where, according to the circumstances, a rule absolute for judgment, or a rule *nisi* to shew cause why the service sworn to should not be deemed sufficient, will be granted. The rule is absolute in the first instance when the service is perfect, as where it is personally delivered, and the notice explained to the tenant himself, or to his wife on the premises. So also where the premises are deserted, and the landlord proceeds on the statute 4 Geo. 2, c. 28, or in the King's Bench on a vacant possession. But, where the service of the declaration is *imperfect*, as where the tenant absconds, or keeps out of the way to avoid being served, &c. the court will grant a rule to shew cause why service of the declaration, by leaving a copy of it with his relation or servant, or other person upon the premises, or by fixing the same upon some conspicuous part thereof, should not be deemed good service, and why in default of appearance judgment should not be entered against the casual ejector, and will direct by the rule in what manner it shall be served. It was formerly usual in the King's Bench to grant such rule with respect to *future* service only, and not with any retrospect, but the practice in that court was altered in the beginning of the last

Of judgment against the casual ejector.

Rule *nisi*, or absolute.

(*a*) Tidd's Pr. 536, 8th edit. 2 Sell. Pr. 214. Adams Eject. 176, 2nd edit.

(*b*) Tidd's Pr. 537, 8th edit. *Ante*, p. 564.

(*c*) Adams Eject. 217, 2nd edit. Tidd's Pr. 537, 8th edit.

Of judgment against the casual ejector.

reign, and made conformable to the course of the Common Pleas, and it is now the practice in both courts to grant the rule, on a proper affidavit, for giving effect to a past service. (*a*) The rule may either be granted upon the tenant, his attorney, or other person by name, or generally, without naming any person in particular (*b*), and, if the rule be made absolute, the rule for judgment will be drawn up as a matter of course.

Time of moving for.

In the King's Bench, if the premises be situated in London or Middlesex, and the notice requires the tenant to appear on the first day, or within the *first four* days of the next term, the motion for judgment against the casual ejector should regularly be made in the beginning of that term, and the tenant must appear in *four* days, or the plaintiff will be entitled to judgment. If, however, the notice be deferred until a later period in the term, the court will order the tenant to appear in *two* or *three* days, and sometimes *immediately*, in order that the plaintiff may proceed to trial at the sittings after term, but, if the motion be not made before the four last days of the term, the tenant need not appear until two days before the essoign day of the subsequent term. (*c*) In the Common Pleas, it is a rule, that "the motion should be made, in town causes, within one week, next after the first day of Michaelmas or Easter term, and within four days, next after the first day of Hilary or Trinity term" (*d*), but this rule only extends to ejectments served on tenants in possession, and not to cases where the possession is vacant, or on statute 4 Geo. 2, c. 28, which may therefore be moved at any time in term. (*e*)

In country causes, since the late rule (*f*), the motion for judgment should, in all cases, be made in the term in which the tenant is required by the notice to appear. (*g*)

One or several rules.

Where there are several tenants in possession, but, in the copies served, the name of the tenant only upon whom the declaration is served, is prefixed to the notice, instead (as is usual) of the names of all, and consequently the person making the affidavit of service cannot swear that the copy of any one declaration and notice was served on all the tenants, yet one rule is

(*a*) Tidd's Pr. 538, 8th edit.

(*b*) Doe d. Ld. Aylesbury v. Roe, 2 Chitty's R. 183. Tidd's Pr. 539, 8th edit.

(*c*) Tidd's Pr. 537, 8th edit. Adams Eject. 217, 2nd edit.

(*d*) R. T. 32 C. 2, C. P.

(*e*) Barnes, 172. Tidd's Pr. 537, 8th edit.

(*f*) *Ante*, p. 554, note (*d*).

(*g*) Tidd's Pr. 540, 8th edit.

sufficient. (*a*) But, where it does not appear from the affidavits that all the tenants have been served, the rule is drawn up specially, mentioning the name or names of those tenants only who have been served, and describing them as "tenant or tenants in possession of part of the premises," and where there were separate declarations, and the notices to appear were addressed to the tenants severally, and there are separate affidavits of service, several rules are drawn up as in several ejectments, and they must afterwards, if necessary, be consolidated. (*b*)

Of judgment against the casual ejector.

The rule for judgment, in town causes, is for the tenant or tenants in possession to appear and plead in the King's Bench or Common Pleas, on a day certain in term, at the distance of *four* days from the day of granting the rule. (*c*) In country causes, since the late rule of all the courts (*d*), the tenant must appear, within four days next after the term, before the essoign day of which notice to appear is given.

Time of appearance.

The clerk of the rules in the King's Bench, and secondaries in the Common Pleas, are required to keep a book, "in which shall be entered all the rules which from time to time shall be *delivered out* in ejectment (instead of the book formerly kept containing a list of ejectments *moved*), in which book shall be mentioned the number of the entry, the county in which the premises lie, the names of the nominal plaintiffs, the first lessor of the plaintiff, (with the words *and others*, if there be more than one) and also the name of the casual ejector, and, unless the rule for judgment be drawn up, and taken away from the office of the clerk of the rules or secondaries, within two days after the end of the term in which the ejectment is moved, no rule shall be drawn up or entered in the book, nor shall any proceedings be had in such ejectment." (*e*) If the rule be not taken away from the office in due time, the clerk of the rules or secondaries will not deliver it out, without a rule of court or order of a judge authorising them to do so. (*f*) And, in case of a vacant possession, where the plaintiff has obtained judgment, but has neglected to take away the rule from the office before the end of the term, the

(*a*) Roe d. Burlton v. Roe, 7 T. R. 477.
(*b*) Tidd's Pr. 540, 8th edit.
(*c*) Tidd's Pr. 540, 8th edit.
(*d*) K. B. 4 B. and A. 539, C. P. 2 B. and B. 705. Exc. 9 Price, 299. *Ante*, p. 554.
(*e*) R. M. 31 G. 3. 4 T. R. 1. R. E. 48 G. 3, C. P. 1 Taunt. 317.
(*f*) Tidd's Pr. 541, 8th edit.

Of judgment against the casual ejector.

court of King's Bench will not assist him by granting a new rule for judgment. (*a*)

Proceedings under statute 1 G. 4, c. 87.

In ejectment by landlord against tenant, on the stat. 1 Geo. 4, c. 87, "where the term or interest of any tenant, holding under a lease or agreement in writing any lands, &c. for any term or number of years certain, or from year to year, shall have expired or been determined, either by the landlord or tenant, by regular notice to quit, and such tenant, or any one holding or claiming by or under him, shall refuse to deliver up possession accordingly, after lawful demand in writing (*b*), made and signed by the landlord or his agent, and served personally upon, or left at the dwelling house or usual place of abode of such tenant or person, and the landlord shall thereupon proceed by action of ejectment, for the recovery of possession, it shall be lawful for him, at the foot of the declaration, to address a notice to such tenant or person, requiring him to appear in the court in which the action shall have been commenced, on the first day of the term then next following, or, if the action shall be brought in Wales, or in the counties palatine of Chester, Lancaster, or Durham respectively, then, on the first day of the next session or assises, or at the court day, or other usual period for appearance to process, then next following, (as the case may be) there to be made defendant, and to find such bail, if ordered by the court, and for such purposes as are thereinafter specified; and, upon the appearance of the party at the day prescribed, or, in case of non-appearance, on making the usual affidavit of service of the declaration and notice, it shall be lawful for the landlord, producing the lease or agreement, or some counterpart or duplicate thereof, and proving the execution of the same by affidavit, and upon affidavit, that the premises have been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired, or been determined by regular notice to quit, as the case may be, and that possession has been lawfully demanded in manner aforesaid, to move the court for a rule for such tenant or person, to shew cause, in a time to be fixed by the court, on a consideration of the situation of the premises, why such tenant or person, upon being admitted defendant, beside entering into the common rule, and giving the common undertaking, should not undertake, in case

(*a*) Anon. 2 Chit. R. 188. v. Roe, 2 D. and R. 565.

(*b*) See Doe d. Marquis of Anglesea

a verdict shall pass for the plaintiff, to give the plaintiff a judgment, to be entered up against the real defendant, of the term next preceding the time of trial, or, if the action shall be brought in Wales, or in the counties palatine respectively, then of the session, assises, or court day, as the case may be, at which the trial shall be had, and also why he should not enter into a recognisance, by himself and two sufficient sureties, in a reasonable sum, conditioned to pay the costs and damages (*a*), which shall be recovered by the plaintiff in the action; and, it shall be lawful for the court, upon cause shewn, or upon affidavit of the service of the rule, in case no cause shall be shewn, to make the same absolute, in the whole or in part, and to order such tenant or person within a time to be fixed, in consideration of all the circumstances, to give such undertaking, and find such bail, with such conditions, and in such manner, as shall be specified in the said rule, or such part of the same, so made absolute; and, in case the party shall neglect or refuse so to do, and shall lay no ground to induce the court to enlarge the time for obeying the same, then, upon affidavit of the service of such order, an absolute rule shall be made for entering up judgment for the plaintiff. (*b*) Provided always, that nothing in that act contained, shall be construed to prejudice or affect any right of action or remedy, which landlords already possessed, in any of the cases hereinbefore provided for."

Of judgment against the casual ejector.

Proceedings under statute 1 G. 4, c. 87.

A tenancy by virtue of an agreement in writing for three months certain, is a tenancy "for a term" within the above statute (*c*); but it does not extend to the case of a lessee holding over after notice to quit given by himself, where his term has not expired by efflux of time (*d*); nor to the case of a lessee from year to year, without a lease or agreement in writing. (*e*) But where the landlord entered into an agreement with the tenant on the 2nd January, 1815, to grant the latter a lease for eight years, of certain premises, the agreement to take effect from the 18th of October, 1814, from which time the tenant had been in posses-

(*a*) The court can only give a reasonable sum for the costs of the action, and not for the mesne damages. Doe d. Sampson v. Roe, 6 B. Moore, 54.

(*b*) Rule *nisi* entitled Doe v. Roe; rule for judgment and execution taken out against tenant by his own name, held good. Doe d. Marquis of Anglesea v. Brown, 3 D. and R. 230.

(*c*) Doe d. Phillips v. Roe, 5 B. and A. 766. 1 Dowl. and Ryl. 433, S. C.

(*d*) Doe d. Cardigan v. Roe, 1 Dowl. and Ryl. 540. Tidd's Pr. 542, 8th edit.

(*e*) Doe d. Earl of Bradford v. Roe, 5 B. and A. 770.

Of judgment against the casual ejector.

sion, yielding 2*s.* 6*d.* yearly, and in case he held over the term, he was to pay 40*s. per diem* for every day he retained possession; and at the expiration of the term the tenant held over, after having been served with a nine months notice to quit at the end of the current year, the tenant was held to be within the statute. (*a*)

Proceedings under statute 1 G. 4, c. 87.

In proceeding on this statute, the lease or agreement under which the tenant holds the premises, or a counterpart, or duplicate thereof, must be produced, though it need not, it seems, be *left* in court; and the execution of the same must be proved by affidavit, as well as that the premises have been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired, or been determined by regular notice to quit; and that a *demand* in writing of the possession has been made and signed by the landlord, or his agent, and personally served upon, or left at the dwelling house or usual place of abode of the tenant, or person holding under him, upon which the court will grant a rule to show cause why the tenant upon being made defendant, instead of the casual ejector, besides entering into the common consent rule, and giving the usual undertaking, should not undertake, in case a verdict should pass for the plaintiff, to give him judgment to be entered up of the preceding term against the real defendant, and why he should not enter into a recognisance by himself, and two sufficient sureties, in a reasonable sum, conditioned to pay the costs and damages which shall be recovered by the plaintiff, pursuant to the statute. The rule *nisi* under this statute need not specify all the particulars thereby required, but the court on making it absolute will direct in what manner it shall be framed. (*b*) If no sufficient cause is shewn on the rule *nisi*, the court will, on making it absolute, order the tenant to give the additional undertaking required by the statute; and also that he do within a certain time to be specified in the rule, enter into a recognisance by himself, and two sufficient sureties, in a certain sum, to be fixed by the court, conditioned to pay the costs and damages, &c.; and the court will also order, that the tenant, on notice of the rule, shall shew cause on a certain day, why, in case he shall neglect or refuse to give such undertakings, and to find such bail, an absolute rule should not be made for entering up judgment for the plaintiff pursuant to the

(*a*) Doe d. Marquis of Anglesea v. Roe, 2 D. and R. 565.

(*b*) Doe d. Phillips v. Roe, 5 B. and A. 766. 1 Dowl. and Ryl. 433, S. C.

statute. (*a*) The undertaking to give judgment of the preceding term is usually inserted in the consent rule, and the recognisance is taken before a judge in town causes, or in the country before a commissioner for taking bail. (*b*)

Of judgment against the casual ejector.

If the tenant in possession or his landlord does not appear within the proper time, but makes default, judgment may be signed against the casual ejector. The fact of non-appearance is ascertained by searching the ejectment books at the judges' chambers in the King's Bench, and the plea book at the prothonotaries' office in the Common Pleas. No rule to plead is necessary before judgment is signed (*c*); but common bail must be filed for the casual ejector in the King's Bench by bill (*d*), though it does not seem necessary to enter an appearance for him by original in that court, or in the Common Pleas (*e*), nor is a bill of Middlesex or *latitat* now necessary in the King's Bench. (*f*) The judgment, however, must not be signed until the afternoon of the day next after that on which the rule expires; and if Sunday happen to be the last day, not until the afternoon of Tuesday. (*g*)

How signed.

In order to sign judgment against the casual ejector, the rule for judgment must be drawn up, with the clerk of the rules in the King's Bench, or secondaries in the Common Pleas, and an *incipitur* of the declaration made, on the judgment paper, and also on a roll of the same term with the rule, beginning in the King's Bench with the warrants of attorney; but in the Common Pleas the warrants of attorney are made out and filed with the clerk of the warrants, who marks the judgment paper, which is taken to the clerk of the judgments in the King's Bench, or prothonotaries in the Common Pleas; and on producing the rule, the clerk will sign the judgment, after which a writ of possession may be immediately sued out and executed, for which a *præcipe* is required in the King's Bench, but not in the Common Pleas. (*h*)

If the judgment against the casual ejector be irregular, the court will set it aside with costs (*i*); and where it was so set aside, and

(*a*) Doe d. Sampson v. Roe, 6 B. Moore, 54.
(*b*) Tidd's Pr. 543, 8th edit.
(*c*) Adams Eject. 222, 2nd edit.
(*d*) R. T. 14 C. 2. R. M. 33 C. 2, K. B.
(*e*) Tidd's Pr. 543, 4. 8th edit.
(*f*) Tidd's Pr. 544.
(*g*) Hyde d. Culliford v. Thrustout, Say. 303.
(*h*) Tidd's Pr. 544, 8th edit.
(*i*) Tidd, 544, 8th edit. Adams Eject. 223, 2nd edit.

Of judgment against the casual ejector.

the lessor of the plaintiff had absconded, and could not be served with the rule, the court of Common Pleas ordered a writ of restitution on behalf of the late tenant in possession. (*a*) And though the judgment be regular, yet the courts will set it aside, on an affidavit of merits and payment of costs. (*b*) But the court of Common Pleas has refused to set aside a judgment and execution in ejectment, in order to let in a person to defend, though he made an affidavit setting out a clear title, and offering to pay costs (*c*); but where collusion is suggested, that court will set aside the judgment. (*d*) In vacation, a judge at chambers upon an affidavit of merits, will compel the plaintiff to accept a plea, or stay the proceedings, provided he will not waive the judgment on payment of costs. (*e*)

Of the appearance and consent rule.

The appearance is either by the tenant or the landlord, or by both. If the tenant appears either alone, or jointly with his landlord, within the time limited by the rule for judgment, he must enter into the common consent rule, to be made defendant instead of the casual ejector, and to confess lease entry and ouster, and insist upon the title only. But in case of a *vacant possession*, no defence can, it is said, be made, except by the defendant, who is a real ejector. (*f*) The time within which the defendant must appear has been already mentioned. (*g*)

Mode of appearing.

If the tenant appears, his attorney procures a blank consent rule from a stationer in the King's Bench, or from the secondaries in the Common Pleas, and fills it up, by entitling it of the term of appearance, and inserting in the margin the county in which the ejectment is laid, and the names of the original parties, and by making the tenant defendant instead of the casual ejector in the body of the rule, which must specify for what premises he means to defend. The defendant's attorney then signs his name at the bottom, leaving a blank for the plaintiff's attorney to do the like; for this, it should be observed, is rather an agreement between the parties for a rule, than the rule itself, which is afterwards drawn up by the proper officer. Common bail is then

(*a*) Barnes, 178.

(*b*) Dobbs v. Passer, 2 Str. 975. Doe d. Troughton v. Roe, 4 Burr. 1996. Anon. 12 Mod. 211.

(*c*) Doe d. Ledger v. Roe, 3 Taunt. 506. Goodtitle v. Badtitle, 4 Taunt. 820.

(*d*) Doe d. Grocer's Comp. v. Roe, 5 Taunt. 205.

(*e*) Tidd's Pr. 545, 8th edit.

(*f*) Tidd's Pr. 545, 8th edit. Barnes, 177. B. N. P. 96.

(*g*) *Ante*, p. 567.

filed by the defendant's attorney in the King's Bench by bill, with the clerk of the common bail, or an appearance entered by original in that court, on a proper *præcipe*, with the filacer, who will mark the rule *by consent*; or in the Common Pleas, an appearance must be entered with the filacer, who will stamp the rule; and at the time of filing common bail, or entering an appearance, the defendant's attorney must deliver to the officer *a memorandum* or minute of his warrant. The plea of *not guilty* is then engrossed and annexed to the consent rule, which being done, the plea and rule are carried to and left at the chambers of one of the judges in the King's Bench, or the prothonotaries' office in the Common Pleas. (*a*)

Of the appearance and consent rule.

By the consent rule, the party applying consents to be made defendant, instead of the casual ejector, to appear at the suit of the plaintiff, and, if the proceedings are by bill, to file common bail; to receive a declaration in ejectment and plead not guilty, and at the trial of the issue to confess lease entry and ouster, and insist on title only; that if at the trial the party appearing shall not confess lease entry and ouster, whereby the plaintiff shall not be able further to prosecute his suit, such party shall pay costs to the plaintiff; and that if a verdict shall be given for the defendant, or the plaintiff shall not further prosecute his suit, for any other cause, than for not confessing lease entry and ouster, the lessor of the plaintiff shall pay costs to the defendant.

Terms of the consent rule.

The lessor of the plaintiff was formerly compelled at the trial to prove that the tenant was in possession of the premises for which the ejectment was brought (*b*); but now by a late rule of the King's Bench and Common Pleas (*c*), "in every action of ejectment the defendant shall specify in the consent rule for what premises he intends to defend; and shall consent in such rule to confess upon the trial, that he (if he defends as tenant, or in case he defends as landlord, that his tenant) was at the time of the service of the declaration, in the possession of such premises, and that if upon the trial the defendant shall not confess such possession as well as lease entry and ouster, whereby the plaintiff shall not be able further to prosecute his suit against the defend-

Tenant's possession.

(*a*) Tidd's Pr. 547, 8th edit.

(*b*) Goodright d. Balch v. Rich, 7 T. R. 329. Fenn d. Blanchard v. Wood, 1 Bos. and Pul. 373.

(*c*) K. B. R. M. 1 G. 4. 4 Barn. and Ald. 196. C. B. R. H. 1 & 2 G. 4. 2 B. and B. 470.

Of the appearance and consent rule.

ant, then no costs shall be allowed for not further prosecuting the same, but the said defendant shall pay costs to the plaintiff in that case to be taxed." This rule operates as a notice of the premises, for which the tenant means to defend, and supersedes the necessity of the plaintiff's proving him in possession of them at the trial. (*a*)

When the tenant appears for the whole of the premises, they may either be described in the consent rule generally, as in the declaration, or as they really are; but when he appears for part of the premises only, that part must be particularly specified in the consent rule (*b*); and the plaintiff in such case having obtained the rule for judgment, may sign judgment against the casual ejector for the residue. (*c*) Where there are several tenants, they may either all join to defend for all the premises generally, or each may defend specially for certain premises by name. (*d*)

Ouster.

Where the ejectment is brought by a tenant in common, jointenant, or parcener, an actual ouster must be proved, unless it be confessed by the consent rule (*e*); and therefore if there has been no actual ouster, the defendant should apply to the court for a special rule to confess lease and entry, and also ouster of the nominal plaintiff, if an actual ouster of the plaintiff's lessor by the defendant shall be proved at the trial, but not otherwise; which rule the court of King's Bench will grant on an affidavit, that there has been no actual ouster by the defendant (*f*); and in the Common Pleas, it is said to be merely a matter of course to grant the rule whenever the defendant is tenant in common, jointenant or coparcener. (*g*)

How landlord is made defendant.

At common law, it appears that a landlord was entitled to be made defendant in ejectment, either alone or jointly with the tenant in possession. (*h*) However, the court of King's Bench having held that the landlord could only be made defendant together with his tenant, and then only in case the latter consented

(*a*) Tidd's Pr. 546, 8th edit.
(*b*) *Ibid.* 547.
(*c*) 2 Sell. Pr. 181.
(*d*) Goodright d. Balch v. Rich, 7. T. R. 330. Tidd's Pr. 547, 8th edit.
(*e*) See *ante*, p. 503. Oates d. Wigfall v. Brydone, 3 Burr. 1897. Doe d. White v. Cuffs, 1 Campb. N. P. C. 173.
(*f*) Tidd's Pr. 547, 8th edit.
(*g*) *Ibid.* 548. Doe d. Gigner v. Roe, 2 Taunt. 397; but in that case, the defendant's affidavit disaffirmed an actual ouster.
(*h*) Fairclaim d. Fowler v. Shamtitle, 3 Burr. 1297, 1301. Lamb v. Archer, Comb. 208. Anon. 12 Mod. 211.

to appear (*a*), the mode of proceeding was at length settled by statute.

Of the appearance and consent rule.

By the 11 G. 2, c. 19, s. 12, every tenant to whom any declaration shall be delivered for any lands, &c. shall forthwith give notice thereof to his or her landlord or landlords, or his, her, or their bailiff, or receiver, under the penalty of forfeiting the value of three years improved or rack rent of the premises so demised or holden in the possession of such tenant, to the person of whom he or she holds; to be recovered by action of debt, &c. This clause only extends to cases in which the ejectment is inconsistent with the landlord's title. Thus a tenant of a mortgagor, who does not give notice of an ejectment brought by the mortgagee on a forfeiture of the mortgage, is not within the statute. (*b*) The improved rent mentioned in this statute, is not the rent reserved, but such rent as the landlord and tenant might fairly agree on, at the time of delivering the declaration in ejectment, if the premises were then to be let. (*c*)

By the same statute, sec. 13. "It shall and may be lawful for the court in which an ejectment is brought, to suffer the landlord or landlords, to make him, her, or themselves, defendant, or defendants, by joining with the tenant or tenants, to whom such declaration in ejectment shall be delivered, in case he or they shall appear, but in case such tenant or tenants shall refuse or neglect to appear, judgment shall be signed against the casual ejector for want of such appearance; but if the landlord or landlords of any part of the lands, tenements, or hereditaments, for which such ejectment was brought, shall desire to appear by himself or themselves, and consent to enter into the like rule, that by the course of the court, the tenant in possession in case he or she had appeared, ought to have done, then the court where such ejectment shall be brought, shall and may permit such landlord or landlords so to do, and order a stay of execution upon such judgment against the casual ejector, until they shall make further order therein."

Some difficulty exists with regard to the persons who are to be considered *landlords* within this act. In one case it was held that it was not every person *claiming title*, who could be admitted to defend as landlord, but only he who had been in some

(*a*) Goodright v. Hart, 2 Str. 830. See 3 Burr. 1298, 1303.

(*b*) Buckley v. Buckley, 1 T. R. 647.

(*c*) Crocker v. Fothergill, 2 B. and A. 652. The plaintiff is not entitled to treble costs. *Ibid.* 662.

Of the appearance and consent rule.

degree in possession, as by receiving rent, &c. and the court, therefore, would not allow a devisee claiming under one will of the testator, to defend as landlord in an ejectment, brought by a devisee claiming under another will of the same testator (*a*); but in a subsequent case the court was inclined to construe the statute more liberally. "There are two matters to be considered," observed Lord Mansfield, "first, whether the term landlord ought not, as to this purpose, to extend to every person whose title is connected to, and consistent with the possession of the occupier, and devested or disturbed by any claim adverse to such possession, as in the case of remainders or reversions expectant upon particular estates; secondly, whether it does not extend as between two persons claiming to be landlords *de jure*, in right of representation to a landlord *de facto*, so as to prevent either from recovering by collusion with the occupier, without a fair trial with the other." (*b*) And in the same case the court inclined to admit the lord by escheat, who claimed *propter defectum sanguinis*, to defend in an ejectment brought by one who claimed as heir at law of the deceased tenant. An heir at law before entry may be admitted to defend under this statute (*c*), and so may a devisee in trust, who has never been in possession. (*d*) So also a mortgagee in an ejectment brought against the mortgagor (*e*), and a reversioner or remainderman. (*f*) In a case before the statute, upon a motion to make the wife of the lessor of the plaintiff a defendant, the plaintiff's title being by a pretended intermarriage with her, which was controverted, the court inclined to grant the motion, but it being thought to be a trick to put off the trial, nothing was done. (*g*)

Where a person claims in opposition to the title of the tenant, he cannot be considered a landlord within the statute. (*h*) In a case before the statute, a parson claiming a right to enter and perform divine service in a chapel, was held not entitled to be

(*a*) Barnes, 193.

(*b*) Fairclaim d. Fowler v. Shamtitle, 3 Burr. 1294.

(*c*) Doe d. Hebblethwaite v. Roe, cited 3 T. R. 783.

(*d*) Lovelock d. Norris v. Dancaster, 4 T. R. 122, cited 3 T. R. 783; but not the *cestui que trust*. *Ibid.*

(*e*) Doe d. Tilyard v. Cooper, 8 T. R. 645.

(*f*) Fairclaim d. Fowler v. Shamtitle, 3 Burr. 1290. Lovelock d. Norris v. Dancaster, 3 T. R. 783. Comb. 339.

(*g*) Fenwick's case, 1 Salk. 257. 7 Mod. 70, S. C.

(*h*) Fairclaim d. Fowler v. Shamtitle, 3 Burr. 1295.

admitted a defendant in ejectment. (*a*) In case a party is wrongly admitted to defend as landlord, the lessor of the plaintiff may apply to the court, or to a judge at chambers, and have the rule discharged with costs (*b*); but where a person has been improperly admitted to defend as landlord, in an ejectment brought by a landlord against his tenant, such person will not be allowed at the trial to controvert the title of the real landlord. (*c*)

Of the appearance and consent rule.

The motion for a rule to admit the landlord to defend, is in ordinary cases a motion of course, requiring only counsel's hand, but it is said, that when the party desirous of being made defendant is not the actual landlord, but has some particular interest to sustain, the court must be moved on an affidavit of the facts, to permit him to defend with or without the tenant, as the case may require. (*d*)

The motion for a rule to admit the landlord, ought regularly to be made before the judgment is signed against the casual ejector, and if delayed until after that period, the court will grant or refuse the rule at their discretion. (*e*) Thus where judgment was signed against the casual ejector, and a writ of possession executed, and it appeared that the landlord's delay arose from the tenant's negligence, in not giving due notice of the service of the declaration, according to the stat. 11 G. 2, c. 19, s. 12, the court ordered the judgment and execution to be set aside, compelled the tenant to pay all the costs, and permitted the landlord to be made defendant on the usual terms. (*f*) But where the landlord applied to be made defendant, after judgment had been signed, but before execution, and the claimant offered to waive his judgment, if the landlord, who resided in Jamaica, would give security for costs, to which offer the landlord's counsel would not accede, the court refused the application, and permitted the plaintiff's lessor to take out execution (*g*); and where the lessor of the plaintiff had obtained judgment and execution in an undefended ejectment without collusion, and had sold part of the premises, and transferred the possession, the court refus-

(*a*) Martin v. Davis, 2 Str. 914, overruling Price v. Jones, cited 1 Salk. 256.

(*b*) Doe d. Harwood v. Lippencott, MS. Adams Eject. 230, 2nd edit.

(*c*) Doe d. Knight v. Smythe, 4 M. and S. 347.

(*d*) Tidd's Pr. 549, 8th edit. Adams Eject. 237, 2nd edit.

(*e*) Tidd's Pr. 550, 8th edit. Adam Eject. 238, 2nd edit.

(*f*) Doe d. Troughton v. Roe, 4 Burr. 1996.

(*g*) Barnes, 186.

Of the appearance and consent rule.

ed to admit a landlord to defend, from whom the tenant had concealed the ejectment. (*a*)

When the landlord defends with the tenant, he joins with him in the consent rule; but when the tenant refuses or neglects to appear, judgment is signed against the casual ejector (*b*), in order that the plaintiff, if a verdict be given for him, may obtain possession of the premises, which he could not do by virtue of a judgment against a person out of possession (*c*), and in that case the landlord alone must enter into the consent rule, but execution is stayed until further order. (*d*) The rule for admitting the landlord to defend being drawn up by the clerk of the rules in the King's Bench, or secondaries in the Common Pleas, a copy is made and annexed to the plea, together with the agreement for the consent rule, properly filled up and signed, and common bail being filed, or a common appearance entered with, and a memorandum of the defendant's warrant of attorney, delivered to the clerk of the common bails or filacer, the plea and rule are left at a judge's chambers in the King's Bench or the prothonotaries' office in the Common Pleas. (*e*)

The tenant or his landlord having appeared, either alone or jointly with each other, and entered into the consent rule or agreement to confess lease entry and ouster, and left the same at a judge's chambers in the King's Bench, or the prothonotaries' office in the Common Pleas; and the tenant, when necessary, having given the undertaking, and entered into the recognisance required by 1 Geo. 4, c. 87, the plaintiff's attorney must search the ejectment books at the judge's chambers in the King's Bench, for the consent rule or agreement, which in that court is signed by the judge, and for which a receipt is given in the ejectment book; and after the plaintiff's attorney has signed his name thereon over that of the defendant's attorney, he carries it to the clerk of the rules, who files it, and draws up the rule therefrom, which is nothing more than a copy of the agreement, prefixing only the day on which it is drawn up, and adding "by the court," instead of the attornies' names at the end. In the Common Pleas, when the defendant has appeared, the consent rule is obtained from the prothonotaries' office, and the plaintiff's

(*a*) Goodtitle v. Badtitle, 4 Taunt. 820.

(*b*) Tidd's Pr. 550, 8th edit.

(*c*) Barnes, 179.

(*d*) Doe d. Roberts v. Gibbs, 1 Chitty's R. 47. Tidd's Pr. 550, 8th edit.

(*e*) Tidd's Pr. 550, 8th edit.

attorney having signed his name thereon over that of the defendant's attorney, carries it to the secondaries' office, where it is filed, and *two* rules are drawn up therefrom, one for each party. (*a*)

Of the appearance and consent rule.

The general issue in ejectment is *not guilty*, which is the only plea in bar, according to the modern practice, ever pleaded in this action. Under this plea, whatever shews that the plaintiff has not a right to the possession, as that his entry is barred by the statute of limitations, may be given in evidence. If, however, the circumstances of the case should require it, the courts will permit the defendant to plead specially. (*b*) A plea of release by the lessor of the plaintiff is bad (*c*), and, if pleaded by the nominal plaintiff, such a plea will be a contempt of court. (*d*)

Of the plea and issue.

A plea in abatement to the jurisdiction may be pleaded in ejectment, with the permission of the court, but it must be pleaded within the first four days, like other pleas in abatement. (*e*)

Plea in abatement.

To obtain leave to plead such a plea, the court must be moved upon affidavit before the expiration of the four first days of term, the plea itself being first filed; and the motion should be for a rule to shew cause why the defendant should not be permitted to plead the facts stated in the affidavit; and why the plea then filed to that effect should not be allowed (*f*), or the tenant in possession may, as it seems, in the first instance, file the plea in his own name, and then move for a rule to shew cause why he should not forthwith be admitted defendant on the usual terms, except so far as relates to pleading the general issue, and why he should not be permitted to plead the facts stated in the affidavit in lieu thereof, and why the plea already filed by him to that effect should not be allowed. (*g*)

A plea of ancient demesne may be pleaded in abatement in ejectment, but it is discouraged by the courts. (*h*) The application for leave to plead this plea must be accompanied by an affidavit that the lands *are held* (*i*) of a manor, which manor

Ancient demesne.

(*a*) Tidd's Pr. 551, 8th edit.
(*b*) Phillips v. Bury, Carth. 180.
(*c*) Doe d. Byne v. Brewer, 4 M. and S. 300.
(*d*) Moore v. Goodright, 2 Str. 899.
(*e*) Denn d. Wroot v. Fenn, 8 T. R. 474. Williams d. Johnson v. Keene, 1 W. Blk. 197. Doe d. Rust v. Roe, 2 Burr. 1046. Doe d. Morton v. Roe, 10 East, 523.
(*f*) Doe d. Morton v. Roe, 10 East, 523. Adams Eject. 242, 2nd edit.
(*g*) Adams Eject. 243, 2nd edit.
(*h*) Doe d. Rust v. Roe, 2 Burr. 1046. Denn d. Wroot v. Fenn, 8 T. R. 474. Com. Dig. Abatement, (D. 1).
(*i*) That they are *parcel* of the manor, is not sufficient. Baker v. Wich, 1 Salk. 56.

Of the plea and issue.

is ancient demesne, or as it seems, of the lord of the manor, which manor is ancient demesne; that there is a court of ancient demesne, in which the plaintiff might have proceeded for the recovery of the lands; and that the claimant has a freehold interest. (*a*) It appears to be necessary to verify this plea by affidavit, like other pleas in abatement. (*b*)

Where the ejectment is brought for copyhold lands, ancient demesne cannot be pleaded (*c*), but, if the affidavit state that the lands are ancient demesne, the court will not reject the plea on a counter affidavit that great part of the lands are copyhold, but will leave the plaintiff to take advantage of that matter in his replication. (*d*)

The plaintiff may reply, that the land is pleadable at common law, and traverse that the manor is ancient demesne. (*e*)

When the tenant has appeared, entered into the consent rule and pleaded, he may rule the plaintiff to reply, before the plaintiff's lessor has joined in the consent rule, and the plaintiff may be non-prossed, but the defendant will not be entitled to costs. (*f*)

Issue.

On the consent rule being drawn up, the issue is made up in the name of the real defendant, instead of the casual ejector, by the plaintiff's attorney, who delivers it in the King's Bench, with *a copy* of the rule annexed, and in the Common Pleas, with one of the original rules annexed, to the defendant's attorney, with notice of trial, as in other actions. (*g*) If there be a variance between the declaration and the issue, as in the day of the demise, the court on motion will direct the issue to be made according to the declaration. (*h*)

Of the evidence.

The right of the plaintiff to recover in an action of ejectment is established by proof of, 1. The title of the lessor of the plain-

(*a*) *Ibid.* Doe d. Morton v. Roe, 10 East, 523. Com. Dig. Abatement, (D. 1). See the form of the plea, Farrers v. Miller, 1 Show. 386. Carth. 220, S. C.

(*b*) Hatch v. Cannon, 3 Wils. 51. (In Formedon). 2 Burr. 1046; but see Goodright v. Shuffill, 2 Lord Raym. 1418; and Selw. N. P. 693, 4th edit. where it is said, that in Doe d. Morton v. Roe, 10 East, 523, the master referred to a case in his note-book, where it was held not to be necessary to verify this plea by affidavit.

(*c*) Brittle v. Bade, 1 Lord Raym. 43. 1 Salk. 185, S. C.

(*d*) Doe d. Morton v. Roe, 10 East, 523.

(*e*) Rast. Ent. 58, b. Com. Dig. Abatement, (D. 1).

(*f*) Goodright d. Ward v. Badtitle, 2 W. Blk. 763.

(*g*) Tidd's Pr. 551, 8th edit. Adams Eject. 244, 2nd edit.

(*h*) Bass v. Bradford, 2 Lord Raym. 1411.

tiff. 2. The lease to the plaintiff. 3. The entry of the plaintiff. 4. The ouster of the plaintiff. 5. The possession of the lands by the defendant. Of these circumstances, the lease, entry, possession, and, in general, the ouster also, are admitted by the consent rule, and the defendant is bound at the trial to insist upon title only.

Of the evidence.

In general, for the lessor of the plaintiff.

As the lessor of the plaintiff can only recover on the strength of his own title, he must be prepared to prove a legal title to the possession of the premises, which he seeks to recover, existing in himself, at the time of the demise stated in the declaration. (*a*) The title proved must be consistent with the demise, and therefore, where a joint demise is stated, it should be proved, that the lessors of the plaintiff had such an interest as would enable them to make such joint demise. Thus, a tenant for life and the remainderman cannot join in a present demise, and cannot, therefore, recover on such a demise in ejectment. (*b*) There is an exception to the rule that the lessor of the plaintiff must shew a good title in ejectment, where the action is brought by a landlord against his tenant, in which case the title of the former need not be proved. (*c*)

His title.

In addition to the proof of a legal title the plaintiff must prove that he had a right of entry, at the time of the demise laid in the declaration, and within twenty years before action brought. As the statute of limitations 21 Jac. 1, c. 16, enacts that no entry shall be made into any lands, but within twenty years after the title has accrued, it is in general sufficient to prove a legal title accruing within twenty years. But, where the title has not accrued within that time, it is incumbent upon the plaintiff to shew that he has been in possession within twenty years, or rather that there has been no possession adverse to his right of entry, for without such adverse possession we have seen that the statute of limitations will not be a bar. (*d*) Even, if there has been an adverse possession for upwards of twenty years, it may be avoided, by shewing that the lessor of the plaintiff laboured

(*a*) See *ante*, p. 548.

(*b*) Treport's case, 6 Rep. 14, b, *ante*, p. 550. What is sufficient proof of a joint demise, see Doe d. Clarke v. Grant, 12 East, 221, cited *ante*, p. 550.

(*c*) See *ante*, p. 589, and *post*, p. 583.

(*d*) See *ante*, p. 502, to p. 508. The declarations of a widow in possession of premises, that she held them for her life, and that after her death they would go to the heirs of her husband, are admissible evidence to negative the fact of her having had twenty years adverse possession. Doe d. Human v. Pettett, 5 B. and A. 223.

Of the evidence.

under some of the disabilities mentioned in the statute 21 Jac. 1, c. 16, and that he has brought his action within the period limited by the act.

Where an actual entry is necessary to complete the title of the lessor of the plaintiff, as where a fine has been levied with proclamations (*a*), proof must be given of such entry.

Tenant's possession.

It was formerly usual to require proof, that the defendant was in possession of the premises sought to be recovered (*b*), but, now by the late rules already mentioned (*c*), such possession is confessed in the consent rule, and no proof of it need be given at the trial.

Situation of the premises.

The premises must be proved to be situated in the parish mentioned in the declaration (*d*), and, though they need not correspond exactly as to number or extent, yet they cannot be recovered unless they are comprehended in the demand. The lessor of the plaintiff may recover less than he demands, though he cannot recover more. (*e*) When he declares for a moiety he may recover a third. (*f*) The court will not, on the trial of an ejectment, when the plaintiff has proved his right to a verdict, inquire as to the metes and boundaries, which are to be tried more properly in an action of trespass. (*g*)

Ouster.

The ouster is in general confessed by the consent rule, as well as the lease and entry, but, where the ejectment is brought by a jointenant, parcener, or tenant in common against his companion, the court will allow the defendant to enter into a special rule, confessing the lease and entry, and also the ouster, if an actual ouster of the plaintiff's lessor by the defendant shall be proved at the trial, but not otherwise. (*h*) In this case, therefore, evidence must be given of facts amounting to an actual ouster. (*i*) Should the common rule have been entered into such proof will be unnecessary, but the plaintiff must be prepared to produce the consent rule. (*k*)

(*a*) See *ante*, p. 497, 501.

(*b*) *Ante*, p. 573.

(*c*) *Ante*, p. 573.

(*d*) Goodtitle d. Pinsent v. Lammiman, 2 Campb. N. P. C. 274. *Ante*, p. 551. To shew that it is situated in the parish, it is *primâ facie* evidence, that the place in which it stands is watched by the watchman of that parish. Doe d. Gunson v. Welsh, 4 Campb. N. P. C. 264.

(*e*) Denn d. Burges v. Purvis, 1 Burr. 330. Bull. N. P. 109. 2 Phill. Evid. 219, 6th edit.

(*f*) *Ibid.*

(*g*) Doe d. Drapers' Company v. Wilson, 2 Stark. N. P. C. 477.

(*h*) *Ante*, p. 574.

(*i*) What will constitute an actual ouster, see *ante*, p. 502, *et seq.*

(*k*) Oates d. Wigfall v. Brydone, 5 Burr. 1897. Doe d. White v. Coff, 1 Camp. N. P. C. 173.

Of the evidence.

Witnesses.

The tenant in possession is not a competent witness to support his landlord's title (*a*); and where the lessor of the plaintiff has proved a *primâ facie* possession in the defendant, a third person will not be allowed to prove that he is himself tenant in possession. (*b*) Where both parties claim as lessees under the person who is produced as a witness, and the question is, whether he demised first to the plaintiff or to the defendant: if the leases were granted without reserving any rent, he will, as it seems, be a competent witness (*c*); but if the parties contending for the possession are to pay rent in different rights, he will not be allowed to prove either lease. (*d*) An heir apparent is a good witness in an ejectment brought for the land, but a remainderman is not, for he has a present interest in the land. (*e*)

By landlord.

Where the ejectment is brought by a landlord against his tenant, it will only be necessary to prove, 1st, the demise, and 2ndly, its determination. Evidence of the title of the lessor of the plaintiff need not be given, for a tenant is not allowed to dispute the title of his landlord (*f*), nor will the tenant be permitted to make a third person defendant, so as to enable him to set up an adverse title against the landlord. (*g*)

Proof of demise.

If the demise is by deed or other written instrument, it may be proved by production of the original, or of a counterpart (*h*); and if it be in the defendant's possession, a notice to produce it should be given (*i*), after which, if not produced, secondary evidence of its contents will be admissible; and where the lease is by parol, it may be proved by a witness who was present at the making of it, or by an admission of the defendant. (*k*) Proof of payment of rent is a sufficient *primâ facie* case for the landlord (*l*); and if there has been no specific demise, but a tenancy

(*a*) Doe d. Foster v. Williams, Cowp. 621. Doe v. Pye, 1 Esp. N. P. C. 364.

(*b*) Doe d. Jones v. Wilde, 5 Taunt. 183. Doe d. Lewis v. Bingham, 4 B. and A. 672.

(*c*) Fox v. Swann, Styles, 482. 3 T. R. 310.

(*d*) *Per* Buller, J. Bell v. Harwood, 3 T. R. 310. Smith v. Chambers, 4 Esp. N. P. C. 164.

(*e*) Smith v. Blackham, 1 Salk. 283.

(*f*) See the cases referred to *ante*, p. p. 405, 452, 459.

(*g*) Doe d. Knight v. Smythe, 4 M. and S. 347.

(*h*) Doe d. West v. Davis, 7 East, 363. Burleigh v. Stibbs, 5 T. R. 465.

(*i*) As to proof, where defendant claims an interest under the deed, see Orr v. Morice, 3 B. and Bingh. 139.

(*k*) 2 Phill. Evid. 221, 6th edit.

(*l*) Doe d. Castleton v. Samuel, 5 Esp. 174. Rogers v. Pitcher, 6 Taunt. 208. Gravenor v. Woodhouse, 1 Bingh. 43. *Ante*, p. 525, and as to proof of payment of rent, see Hawkins v. Warre, 3 B. and C. 690.

Of the evidence.

By landlord.

has been created by payment and receipt of rent, evidence of such payment must be given, which will be *primâ facie* proof of a tenancy from year to year. (*a*)

But the tenant may prove that his landlord's title has expired, provided he has done no act to recognise a title in him since that period. (*b*) Thus he may prove that his landlord was tenant for years, and that the term has expired (*c*), or that he was tenant *pur autre vie*, and that *cestui que vie* is dead (*d*), or that he has granted the reversion. (*e*) So the payment of rent, though it is *primâ facie* evidence of a tenancy, will not prevent the tenant from shewing that the title of his landlord has since expired, or that the rent has been paid under a misrepresentation. (*f*)

With regard to the determination of the tenancy, the evidence may be considered under three heads. 1. Where the action is brought on the expiration of the tenancy, by effluxion of time, or the happening of a particular event. 2ndly. When it is brought on the determination of the tenancy by notice to quit; and 3dly, When it is brought on a forfeiture.

On the expiration of the tenancy.

When the action is brought on the expiration of the tenancy by efflux of time, or the happening of a particular event (*g*), the lessor of the plaintiff, having proved the demise in the manner stated above (*h*), must shew that the tenancy has expired, which is usually proved by the same evidence which establishes the demise, viz. by the production of the lease, from which it appears that the term granted expired before the day of the demise laid in the declaration. If the duration of the term is dependant upon the happening of a certain event, the happening of such event must be proved, or an admission by the tenant to that effect. (*i*)

On the determination of the tenancy by notice to quit.

When the action is brought upon the determination of the tenancy by notice to quit, the lessor of the plaintiff must prove, 1st, the demise to the tenant (*k*); and 2dly, the service of a proper notice to quit; or where the defendant is tenant at will, or has

(*a*) See *ante*, p. 526.

(*b*) *Ante*, p. 406, 459. He should, it seems, disclaim to hold of him. Balls v. Westwood, 2 Campb. N.P.C. 11. 1 Bing. 363.

(*c*) England d. Syburn v. Slade, 4 T. R. 682. Neave v. Moss, 1 Bingh. 360.

(*d*) Doe d. Jackson v. Ramsbotham, 3 M. and S. 516.

(*e*) Doe d. Lowden v. Watson, 2 Stark. N. P. C. 230.

(*f*) Williams v. Bartholomew, 1 Bos. and Pul. 328. Rogers v. Pitcher, 6 Taunt. 208, 210. Gravenor v. Woodhouse, 1 Bingh. 43.

(*g*) *Ante*, p. 515.

(*h*) *Ante*, p. 583.

(*i*) Doe d. Waithman v. Miles, 1 Stark. N. P. C. 181. 2 Phill. Evid. 222, 2nd edit.

(*k*) *Ante*, p. 583.

Of the evidence.

By landlord.

come lawfully into possession, as under a treaty for a lease or a purchase (*a*), it will be necessary to prove a demand of possession, or some other act to determine the possession before the time of the demise laid in the declaration. (*b*)

A written notice to quit may be proved by a duplicate original, or an examined copy, without proof of a notice to produce the one delivered. (*c*) The notice delivered must be proved to have been properly signed, and if attested, the attesting witness must be called. (*d*) A parol notice may be proved by the person who delivered it, or by any one who heard it delivered.

The notice must be proved to have been given half a year before the end of the current year of the tenancy, with the exceptions already noticed (*e*), and so as to expire at the expiration of that year. (*f*) The expiration of the year will depend upon the time of the commencement of the tenancy, and the period at which, under various circumstances, a tenancy is held to commence, has been already stated. (*g*) It has also been shown, that when a notice to quit, expiring on a certain day, has been personally served upon the tenant who makes no objection, it will be *primâ facie* evidence to go to the jury, that the tenancy commenced according to the terms of the notice. (*h*) But where the notice is not to quit on a particular day, but to quit "on the expiration of the term," or "of the current year of the tenancy;" such notice furnishes no sort of evidence, although not objected to, of the commencement of the tenancy, and further proof will be requisite. The admission of the tenant will be conclusive evidence as to the commencement of the tenancy (*i*), and a receipt for rent up to a particular day will be *primâ facie* evidence. (*k*)

The persons by whom a notice to quit may be given have been already mentioned. (*l*) When the notice is given by an agent, some proof of his authority is requisite. (*m*) The agent himself may be called for this purpose, and the mere bringing of the ejectment in the name of the landlord, where the tenant holds under a single person, seems to be a sufficient recognition of the

(*a*) *Ante*, p. 524.
(*b*) *Ibid.*
(*c*) 1 Phill. Evid. 427, 2, 229, 6th edit. Kine v. Beaumont, 3 B. and B. 288; but it is usual to give a notice to produce.
(*d*) 1 Phill. Evid. 446. 2, 229. *Ante*, p. 532.
(*e*) *Ante*, p. 527.
(*f*) *Ibid.*
(*g*) *Ante*, p. 527 to 529.
(*h*) *Ante*, p. 529.
(*i*) *Ibid.*
(*k*) *Ibid.*
(*l*) *Ibid.*
(*m*) 2 Phill. Evid. 230, 6th edit.

Of the evidence.

By landlord.

act done by the agent (*a*); but if the defendant holds under several landlords, some further evidence seems necessary, than the mere bringing of the ejectment, which may have been commenced by one only; the attorney may prove that the action has been brought under the joint direction of all the lessors, or the agent may shew an authority signed by all the lessors, though some of them signed it after the notice to quit given. (*b*) So if the notice be given by a steward of a corporation, he must be proved to be such, but an authority under the corporation seal need not be shewn. (*c*)

The persons upon whom (*d*), and the manner in which (*e*), the notice should be served, have been already mentioned, and the evidence, which it will be necessary to adduce, of those facts, may be collected from what is there said.

On a forfeiture.

Where the landlord has brought ejectment on a proviso of re-entry for non-payment of rent, or a breach of any of the covenants contained in the lease, he must in the first place prove the demise (*f*), which may be done by producing a counterpart of the lease, which will be evidence of the lessee, or any one coming in under the lease, holding under the conditions and covenants mentioned in the lease (*g*), or secondary evidence may be given of the lease, after notice to produce (*h*). The right of re-entry reserved to the lessor of the plaintiff, will appear on proof of the lease.

If the proceeding be at common law for non-payment of rent, a regular demand of the rent with all the solemnities before mentioned must be proved. (*i*) But if the ejectment be brought under the stat. 4 Geo. 2, c. 28, the plaintiff need not prove such demand, but must be prepared at the trial with evidence of the service of the declaration in ejectment, or of the affixing of the same to the door, &c. of the premises, according to the terms of the

(*a*) *Ibid.*

(*b*) *Ibid.* Goodtitle d. King v. Woodward, 3 Barn. and Ald. 689.

(*c*) Roe d. Dean, &c. of Rochester v. Pierce, 2 Campb. N. P. C. 96.

(*d*) *Ante*, p. 530.

(*e*) *Ante*, p. 532.

(*f*) The landlord's title cannot be disputed. So a copyholder who has been admitted to a tenement and done fealty to the lord of a manor, is estopped in an action by the lord for a forfeiture, from shewing that the legal estate was not in the lord at the time of admittance. Doe d. Nepean v. Badden, 5 B. and A. 626.

(*g*) Roe d. West v. Davis, 7 East, 363.

(*h*) *Ante*, p. 583.

(*i*) *Ante*, p. 535; unless the demand has been dispensed with by the express agreement of the parties. *Ibid.*

statute (*a*) He must also prove that half a year's rent is due, and that no sufficient distress was found on the premises, countervailing the arrears of rent. Evidence that there was no sufficient distress on the premises on a certain day, between the day when the rent became due, and the service of the declaration in ejectment, is sufficient *primâ facie* evidence. (*b*) Of the evidence. By landlord.

When the ejectment is brought for a breach of any of the covenants in a lease, in which there is a proviso of re-entry on breach of covenants, the lessor of the plaintiff must prove the demise in the manner above stated, and the breach of the covenant insisted on; and if a particular of the breaches has been given, the proof must be according to the terms of the particular. (*c*) Where the ejectment is brought on a forfeiture incurred by underletting, it is sufficient *primâ facie* evidence, to prove a third person in possession of the premises, acting and appearing as the tenant, and the declarations of such person are said to be evidence. (*d*)

By way of defence, the tenant may shew that there is not half a year's rent due, or that there was a sufficient distress on the premises to countervail the arrears, or in cases where the lease is voidable only, that the forfeiture has been avoided. (*e*)

Where the lessor of the plaintiff claims as heir at law, he must prove, 1. That the ancestor from whom he claims was the last person who had the actual seisin of the freehold and inheritance of the lands in fee simple, or in case he claims as heir to a remainderman, that the ancestor from whom he claims was the person in whom the remainder first vested by purchase (*f*); and 2dly, That he is heir to such ancestor. Where he claims as heir to one in remainder, he must also prove that the remainder has vested in possession. By heir at law.

1. The seisin in fee of the ancestor may be proved by shewing that he was in actual possession of the premises, or that he received rent from the person in possession, which is presumptive evidence of a seisin in fee. (*g*) So proof of the possession of the

(*a*) *Ante*, p. 535.

(*b*) Doe d. Smelt v. Fuchau, 15 East, 286. *Ante*, p. 538.

(*c*) Doe d. Birch v. Phillips, 6 T. R. 597.

(*d*) Doe d. Hinley v. Rickarby, 5 Esp. N. P. C. 4; but see Doe v. Payne, 1 Stark. N. P. C. 86. *Ante*, p. 464.

(*e*) See *ante*, p. 540.

(*f*) Radcliffe's case, 3 Rep. 42, a. Watk. on Desc. 120.

(*g*) Co. Litt. 15, a. Bull. N. P. 103. Doe v. Spencer, 11 East, 498. Peaceable d. Uncle v. Watson, 4 Taunt. 16. Jayne v. Price, 4 Taunt. 326. Vin. Ab. Evid. (T. b. 107,) pl. 4.

Of the evidence.

By heir at law.

ancestor's lessee for years is sufficient evidence of seisin, for the possession of tenant for years gives an actual seisin to the owner of the inheritance. (*a*) So the possession of guardian in socage confers an actual seisin upon the infant. (*b*)

2. The lessor of the plaintiff must prove his descent from the ancestor from whom he claims, and must shew that all the intermediate heirs are dead without issue. (*c*) If he claim as collateral heir, he must prove the descent of himself and the person last seised, from a common ancestor, or at least from two brothers or sisters. (*d*)

Births, marriages, or deaths (*e*), may be proved by an examined copy of entries in parish registers, and proof of the identity of the persons therein named, and the parties in question. (*f*) So the ancient books of the Herald's Office are evidence of pedigrees. (*g*) But a pedigree drawn out by a herald, unaccompanied by regular proof from the office, is inadmissible. (*h*)

Declarations of deceased members of the family are admissible evidence to prove relationship. (*i*) So descriptions in family bibles, or a memorandum made by one of the family, recitals in family deeds, monumental inscriptions, engravings on rings, old

(*a*) Co. Litt. 243, a. Ratcliff's case, 3 Rep. 42, a. Jenk. Cent. 242. 3 B. and C. 307.

(*b*) Doe d. Newman v. Newman, 3 Wils. 516.

(*c*) Richards v. Richards, 15 East, 294, note. Roe d. Thorne v. Lord, 2 W. Bl. 1099. In the latter case, it is said that the judges, who thought that the deduction of descent was necessary, held (in their private conferences) that the same which ought to be pleaded in real actions, ought now to be given in evidence in ejectment, in order to make out a title by descent. See the mode of pleading a title in *formedon*, *ante*, p. 56, *et seq.*

(*d*) 2 Bl. Com. 208. Doe d. Thorne v. Lord, 2 W. Bl. 1100.

(*e*) By stat. 19 C. 2, c. 6, s. 2, persons for whose life estates are granted, being absent seven years, and no proof of their lives, shall be accounted dead, and reversioner shall recover. Carth. 246; and see 6 Ann, c. 18. Persons are presumed living until the contrary is proved, 2 Roll. Rep. 461; but in analogy to the statute 19 Car. 2, and the statute of bigamy, (1 Jac. 1, c. 11,) the presumption of the duration of life, with respect to persons of whom no account can be given, ends at the expiration of seven years, from the time when they were last known to be living. *Per* Ld. Ellenborough, Doe v. Jesson, 6 East, 85. See also Doe d. Lloyd v. Deakin, 4 B. and A. 433. Proof by one of a family, that many years before, a younger brother of the person last seised had gone abroad, and that the repute of the family was, that he had died there, and that the witness had never heard in the family of his having been married, is *prima facie* evidence of his death without issue. Doe d. Banning v. Griffin, 15 East, 293.

(*f*) 1 Phill. Evid. 389. 2, 233, 6th edit.

(*g*) King d. Lord Thanet v. Foster, T. Jones, 224. 1 Phill. Evid. 401.

(*h*) *Ibid.* 2 Roll. Ab. 687, l. 1.

(*i*) Bull. N. P. 294, 5.

Of the evidence.

By heir at law.

pedigrees hung up in family mansions, and the like, are admissible. (*a*) But the declarations of servants and intimate acquaintances are not evidence (*b*), though declarations by a deceased husband as to the legitimacy of his wife are admissible. (*c*) The hearsay of a relative is not evidence when the relative himself can be produced (*d*), and declarations made after the commencement of a suit, or of a controversy preparatory to one, cannot be admitted (*e*), nor is hearsay evidence admissible to prove the place of any particular birth. (*f*)

In proving a marriage, it will not be necessary to give evidence in the first instance of the regular publication of the banns, or of the regularity of the licence, for the presumptive proofs of marriage have not been taken away by the marriage act (*g*), and, since that act, a marriage may be proved by reputation as well as before (*h*), or by the presumption arising from cohabitation. (*i*) But the other party may shew the marriage void on account of the irregularity of the licence, or of the publication of the banns. (*k*) Either of the married parties, provided they are not interested, is competent to prove or to disprove the marriage. (*l*) So the declarations of a deceased person, as to the fact of his marriage, are admissible in a question of pedigree. (*m*)

To prove the illegitimacy of a child, want of access, or any circumstances which tend to shew that the husband could not, in the course of nature, have been the father of his wife's child, are good evidence (*n*), and presumptive evidence of non-access is admissible. (*o*) In case of a separation *à mensâ et thoro*, the children born during that period will be bastards, unless access be proved. (*p*) A wife will not be permitted to prove non-access of her husband,

(*a*) 1 Phill. Evid. 227, 13 Ves. 144. Ball. N. P. 733. Cowp. 594. 10 East, 120. Vin. Ab. Evid. (T. b. 87).

(*b*) Johnson v. Lawson, 2 Bingh. 86.

(*c*) Vowels v. Young, 13 Ves. 148.

(*d*) Pendrell v. Pendrell, 2 Str. 925.

(*e*) Berkeley peerage case, 4 Campb. 401. 1 Phill. Evid. 229, 6th edit.

(*f*) R. v. Inhab. of Erith, 8 East, 542.

(*g*) Devereux v. Much Dew Church 1 W. Bl. 567. 2 Phill. Evid. 236, 6th edit.

(*h*) *Per* Kenyon, C. J. Reed v. Passer, Peake's N. P. C. 233.

(*i*) Bull. N. P. 114. Wilkinson v. Rayne, 4 T. R. 468.

(*k*) 2 Phill. Evid. 236, 6th edit.

(*l*) Goodright d. Stevens v. Moss, Cowp. 593. Bull. N. P. 113. R. v. Inhabitants of Bramley, 6 T. R. 330. Standen v. Standen, Peake's N. P. C. 32.

(*m*) Bull. N. P. 113. 2 Phill. Evid. 237, 6th edit.

(*n*) R. v. Luffe, 8 East, 206.

(*o*) Goodright d. Thompson v. Saul, 4 T. R. 356.

(*p*) Case of St. George and St. Margaret, 1 Salk. 123.

Of the evidence.

but she is competent to prove the fact of her connexion with the person whom she charges as being the real father of her child. (*a*) But the declarations of a father or mother as to non-access are not admissible to bastardize the issue born after marriage. (*b*)

By devisee of freehold interest.

A devisee of freehold property bringing ejectment will have to prove, 1st. The *seisin* of the testator. 2ndly. The regular execution of the will, and, in case there are any estates limited by the will, prior to the devise to himself, the determination of such estates; and 3rdly, The death of the testator. (*c*) The mode of proving *seisin* has been already stated. (*d*)

Proof of will. *Stat. of frauds.*

The statute of frauds (29 Ch. 2, c. 3, s. 5,) enacts, that all devises and bequests of lands or tenements "shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the devisor, by three or four credible witnesses, or else they shall be utterly void and of non effect."

What witnesses competent.

By statute 25 Geo. 2, c. 6, s. 1, if any person shall attest the execution of any will or codicil, to whom any beneficial devise, legacy, estate, interest, gift, or appointment of, or affecting any real or personal estate, other than and except charges on land for payment of debts, shall be thereby given or made, such devise, &c. shall so far only as concerns such person, or any person claiming under him, be void, and he shall be admitted a witness to the execution of the will or codicil. By the same statute, if a creditor of the devisor, whose will is charged with the payment of the debt, attests the will, he shall be admitted as a witness, but his credit shall be subject to the consideration and determination of the court and jury. Where the attesting witness is the husband of a devisee, who takes an estate in remainder under the will, he is not made competent by the statute. (*e*)

Will produced.

The will itself should be produced to establish the devise, for neither an exemplification of it under the great seal, nor the probate of it in the spiritual court, is evidence for that purpose. (*f*)

(*a*) R. v. Luffe, 8 East, 203. R. v. Reading, cases *temp.* Hardw. 82. R. v. Inhab. of Kea, 11 East, 132.

(*b*) Goodright d. Stevens v. Moss, Cowp. 592.

(*c*) 2 Phill. Evid. 240, 6th edit. 2 Stark. Evid. 119.

(*d*) *Ante*, p. 587.

(*e*) Hatfield v. Thorp, 5 Barn. and A. 589.

(*f*) Comberb. 46. Ball. N. P. 246. 1 Phill. Evid. 478, 6th edit. 3 Stark. Evid. 1682. 2 Campb. N. P. C. 388.

Of the evidence.

If the original will is lost, an examined copy of it may be read as secondary evidence (*a*), or, if there is no such copy, parol evidence of its contents may be given. (*b*)

By devisee of freehold interest.

In a court of law one witness who can speak to all the requisites of the attestation is sufficient to prove the execution. (*c*) But, in Chancery, on a bill to establish a will, all the witnesses must be examined (*d*), which is also the practice on an issue out of Chancery. (*e*)

How proved.

The witness must first prove that the will was signed by the testator, or by some other person in his presence, and by his express directions. It will be sufficient, if the testator sign his name at the beginning of the will. (*f*) It seems now to be the established rule that sealing without signing is not a sufficient execution of a will. (*g*) If the will is written on several sheets, and the testator signs some, and intends to sign the rest, but does not, this is not a sufficient execution. (*h*) But, where the will, which was written on three sides of a sheet of paper, concluded by stating, that the testator had signed his name to the first two sides, and had put his hand and seal to the last, and, in fact, he had put his hand and seal to the last, but had omitted to sign the other sides, it was held, that the will was good, the signing the last sheet shewing that the former intention had been abandoned. (*i*) Where the testator is blind, it is not necessary to read over the will previous to execution, in the presence of the witnesses. (*k*)

The witnesses need not see the testator actually sign his will; if he declare before them that the will is his, or that the signature is his hand-writing, it will be sufficient. (*l*) If the witnesses set their marks to the will it is a sufficient attestation (*m*), and they may subscribe it at several times (*n*), but, in that case, one wit-

(*a*) Doe d. Ash v. Calvert, 2 Campb. N. P. C. 389.

(*b*) *Ibid.* note.

(*c*) Bull. N. P. 264. Longford v. Eyre, 1 P. Wms. 741.

(*d*) Hindson v. Kersey, 4 Burn's Ecc. Law, 93. Townsend v. Ives, 1 Wils. 216.

(*e*) Bootle v. Blundell, 1 Coop. Ch. R. 136.

(*f*) Lemayne v. Stanley, 3 Lev. 1. Freeman, 538, S. C.

(*g*) 1 Phill. Evid. 480, 6th edit, and the cases there cited. 3 Stark. Evid. 1683.

(*h*) Right v. Price, Dougl. 241.

(*i*) Winsor v. Pratt, 2 B. and B. 650.

(*k*) Longchamp v. Fish, 2 N. R. 415.

(*l*) Grayson v. Atkinson, 2 Ves. 454. Ellis v. Smith, 1 Ves. J. 11. Westbeech v. Kennedy, 1 Ves. and B. 362. 1 Phill. Ev. 481.

(*m*) Harrison v. Harrison, 8 Ves. 185.

(*n*) Cook v. Parsons, Prec. in Ch. 185. 2 Ves. 458. 1 Ves. J. 14.

Of the evidence.

By devisee of freehold interest.

ness alone may not be able to prove the due execution of the will. It is not necessary that the witnesses should attest every page, or that they should know the contents, but all the will should be in the room; whether it was so or not is a question for the jury. (*a*)

The witnesses are required to attest and subscribe in the presence of the testator, but that fact need not be expressed in the attestation, though it must be proved in evidence. (*b*) It is not necessary that the testator should actually see the witnesses signing (*c*), it is sufficient, if he be in such a state of mind, and such a situation, as to be capable of seeing the witnesses in the act of subscribing. (*d*) If the witnesses are all dead or insane, their hand-writing and that of the testator must be proved, and though the attestation does not express that the witnesses signed the will in the presence of the testator, yet a jury may find in favour of the will. (*e*)

Witness dead.

Or abroad.

Where a witness to a will is abroad, proof of his hand-writing is admissible. (*f*)

Though all the subscribing witnesses to a will should swear that it was not duly executed, yet the devisee may give evidence in support of the will. (*g*)

Proof of will above thirty years old.

In a court of law a will thirty years old, if the possession has gone under it, and sometimes without the possession, but always with the possession, if the signing is sufficiently recorded, proves itself; but, if the signing is not sufficiently recorded, it is a question whether the age proves its validity, and then possession under the will, and claiming and dealing with the property as if it had passed under the will, is cogent evidence to prove the duly signing, though it should not be recorded. (*h*)

The defendant may impeach the will, either by shewing that

(*a*) Bond v. Seawell, 3 Burr. 1773. 1 Wm. Bl. 407, S. C. Lea v. Libb, 3 Mod. 262.

(*b*) Brice v. Smith, Willes, 1. 6 Dow, 202.

(*c*) Shires v. Glascock, 2 Salk. 688.

(*d*) 1 Phill. Evid. 482, 6th edit. citing Cater v. Price, 1 Dougl. 241. Shires v. Glascock, 2 Salk. 688. Sheer's case, cited Carth. 81. Davy v. Smith, 3 Salk. 395. Camon v. Dade, 1 Br. Ch. Ca. 99. Doe v. Manifold, 1 M. and S. 294.

(*e*) Croft v. Paulet, 2 Str. 1109. Brice v. Smith, Willes, 1. Hands v. James, Com. 530.

(*f*) Ld. Carrington v. Payne, 5 Ves. 411. Powel v. Cleaver, 2 Br. Ch. Ca. 504. 1 Phill. Ev. 484.

(*g*) Bull. N. P. 264. Lowe v. Joliffe, 1 Wm. Bl. 365.

(*h*) *Per* Lord Eldon, C. in Lord Radcliffe v. Parkyns, 6 Dow, 202; and see Mackenzie v. Fraser, 9 Ves. 5. Calthorpe v. Gough, 4 T. R. 707, 708, notes. 1 Phill. Ev. 485.

it is a forgery, or by proving the incapacity of the testator to make a will. That incapacity may arise either by coverture or infancy (*a*), or by idiotcy, or nonsane memory. (*b*) In answer to the defence of insanity, the plaintiff may shew that the will was executed during a lucid interval. (*c*) The defendant may also prove the will void on account of fraud. (*d*)

Of the evidence.

By devisee of freehold interest.

Evidence for defendant.

Revocation.

The defendant may likewise shew that the will has been revoked: 1. By some other will or codicil in writing, which must be a will duly executed according to the 5th sec. of the statute of frauds (*e*), and such will, if it does not expressly revoke, operates as a revocation, so far only as it is clearly inconsistent with the former devise. (*f*) 2dly. By a writing declaring a revocation, according to the 6th section of the statute of frauds, which requires such writing to be signed in the presence of three or four witnesses, but not that the witnesses should subscribe in the presence of the testator. (*g*) 3dly. According to the same section, by burning, cancelling, tearing, or obliterating the will by the testator himself, or by his directions and consent, which acts must be done with the intent to revoke (*h*), and a partial or incomplete burning, &c. with such an intention, will be a complete revocation. (*i*) 4th. The defendant may shew the will revoked by the happening of any of those circumstances which constitute an implied revocation, as by a subsequent marriage and the birth of a child without provision made for them. (*k*)

The devisee of a leasehold interest must prove. 1. The execution of the lease by the lessor, or, if the testator was an assig-

By devisee of leasehold interest.

(*a*) Stat 34, 35 Hen. 8, c. 5, s. 14.

(*b*) *Ibid.* Marquis of Winchester's case, 6 Rep. 23, a.

(*c*) 1 Phillim. Rep. 100. Atty. Gen. v. Parnther, 3 Br. C.C. 443. Expte. Holyland, 11 Ves. 11. 2 Phill. Evid. 241, 6th edit.

(*d*) Doe d. Small v. Allen, 8 T. R. 147.

(*e*) Eccleston v. Speke, Carth. 80. Onions v. Tyrer, 1 P. Williams, 343. Winsor v. Pratt, 2 B. and B. 656. 2 Phill. Evid. 244, 6th edit. 3 Stark. Evid. 1714.

(*f*) Harwood v. Goodright, Cowp. 87.

(*g*) Townsend v. Pearce, 8 Vin. Ab. Dev. p. 142. 1 P. Wms. 345.

(*h*) 2 Phill. Evid. 245, 6th edit.; and the cases there collected; and Winsor v. Pratt, 2 B. and B. 655. 3 Stark. Evid. 1714.

(*i*) Bibb d. Mole v. Thomas, 2 Wm. Bl. 1043. Doe d. Perkes v. Perkes, 3 Barn. and Ald. 489.

(*k*) 2 Phill. Evid. 245; and see Cruise's Dig. v. 6, c. 6, title Devise. As to the admissibility of parol evidence to rebut implied revocations, see 2 H. Bl. 524. 1 Phill. Rep. 469, 341, 344, 460. 4 Ves. 848. 2 East, 543. 5 T. R. 58. 3 Stark. Evid. 1716.

Of the evidence.

nee of the original lease, the execution of the lease, and the assignment to the testator. (*a*) 2. The probate of the will, since the lease is a chattel interest; and 3dly. The assent of the executor to the bequest. (*b*)

By devisee of copyhold premises.

The devisee of copyhold premises must prove: 1st. The admittance of the testator. 2dly. The will, and in cases not within the statute 55 Geo. 3, c. 192, which dispenses with such surrenders, a surrender to the use of the will; and 3dly. His own admittance. (*c*) A will to pass copyholds need not be signed with the same solemnities as a devise of lands in fee-simple; a draft of, or instructions for a will have been held sufficient to direct the uses of a surrender. (*d*) If the surrender was before the day of the demise, the admittance may be at any time before trial. (*e*) The surrender and admittance may be proved by the original entries on the court rolls of the manor, or by copies of the court rolls of the admittance and surrender properly stamped (*f*), with evidence of the identity of the party admitted. (*g*) The admittance of tenant for life being the admittance of him in remainder (*h*), a devisee in remainder need only shew the admittance of the first copyholder for life.

By mortgagee.

In ejectment by a mortgagee against a mortgagor in possession, the mortgagee need only prove the execution of the mortgage deed (*i*), but, if a third person be in possession, the lessor of the plaintiff must shew a title to oust him. Thus, if he be a tenant from year to year, who came in prior to the mortgage, the lessor must prove the tenancy, and that he has given him a regular notice to quit (*k*), but, if the tenant came in subsequently to the mortgage, and has not been acknowledged as tenant by the mortgagee, it will be sufficient to shew that his interest was

(*a*) Doe d. Digby v. Steel, 3 Campb. N. P. C. 115.

(*b*) 2 Phill. Evid. 247, 6th edit. 2 Stark. Evid. 519. *Ante*, p. 514.

(*c*) Roe d. Jefferys v. Hicks, 2 Wils. 15. 2 Phill. Evid. 248, 6th edit. 2 Stark. Evid. 417. *Ante*. p. 512.

(*d*) Carey v. Askew, 2 Br. C. C. 319. Doe d. Cooke v. Danvers, 7 East, 299, 324.

(*e*) Doe d. Bennington v. Hall, 16 East, 208. *Ante*, p. 512.

(*f*) *Ibid.*

(*g*) Doe d. Hanson v. Smith, 1 Campb. N. P. C. 197.

(*h*) Auncelme v. Auncelme, Cro. Jac. 31. *Ante*, p. 513.

(*i*) It seems, that the mortgagee should prove a demand of possession. *Ante*, p. 549, *quære.*

(*k*) Thunder d. Weaver v. Belcher, 3 East, 449. 2 Phill. Evid. 255, 6th edit. 2 Stark. Evid. 537. *Ante*, p. 544.

created subsequently to the title of the lessor of the plaintiff, without proving any notice to quit. (*a*)

Of the evidence.

By parson.

When a parson brings ejectment for the recovery of the parsonage-house, glebe, or tithes, he must shew his title, by proving his presentation, institution, and induction, and this is sufficient without proof of title in the patron. (*b*) If the presentation was by parol, it may be proved by a witness who was present and heard it (*c*), but, a presentation by a corporation must be in writing under their common seal. (*d*) The institution may be proved by the letters testimonial of institution, or by the official entry in the public register of the diocese, which ought regularly to record the time of the institution, and on whose presentation. (*e*) The induction may be proved either by some person present at the ceremony, or by the indorsement on the mandate, which is directed by the ordinary to the archdeacon, or by the return to the mandate, if a return has been made. (*f*) The lessor of the plaintiff will not be required to prove that he has taken the requisite oaths, or that he has declared his assent to the book of common prayer, according to the act of uniformity (13, 14 C. 2, s. 6.) (*g*) Some evidence should be given to shew that the property to be recovered is the property of the church, as that the premises were occupied by a former incumbent, &c. (*h*)

(*a*) *Ante*, p. 544.

(*b*) Heath v. Pryn, 1 Vent. 14. Bull. N. P. 105. 2 Phill. Evid. 256, 6th edit. 2 Stark. Evid. 536. Before induction, the parson has not the temporalties belonging to his rectory, 2 Inst. 358; nor can he have spoliation, trespass, or assise, Plowd. 528; he has no remedy for the profits, *per* Popham, J. Quaries v. Fairchild, Cro. Eliz. 653; that is, the temporal profits, Anon. 11 Mod. 46. Before induction he has not the freehold either in deed or in law. Plowd. 528. See further, Vin. Ab. Presentation, (D. b. 2). Com. Dig. Eglise, (L). Wats. Clerg. Law, 156. But see Hitching v. Glover, 1 Rol. Rep. 192, where it is said by Coke, that he who is instituted may enter into the glebe land before induction, and has a right to have it against a stranger. However, it is said, in Plowd. 528, that no possession can be had before induction, and a parson instituted, but not inducted, is compared by Manwood to a woman who has recovered dower, and who cannot enter before the sheriff delivers seisin. *Ibid.* 529. *Ante*, p. 341.

(*c*) See R. v. Eriswell, 3 T. R, 723. 2 Phill. Evid. 256. Bull. N. P. 105.

(*d*) Gibs. Codex, 794.

(*e*) *Ibid.* 813.

(*f*) 2 Phill. Evid. 267, 2nd edit. See Chapman v. Beard, 3 Anst. 942.

(*g*) *Ibid.* Powell v. Millbank, 2 W. Bl. 851. 3 Wils. 355, S. C. 3 East, 199. 3 Anst. 942.

(*h*) 2 Phill. Evid. 258.

Of the evidence.

By a person claiming under an execution.

If a tenant by *elegit* bring ejectment (*a*), he must prove the judgment, the *elegit* taken out upon it, and the inquisition and return thereupon (*b*); for this purpose an examined copy of the judgment roll, containing the award of *elegit* and the return of the inquisition is sufficient, without proving a copy of the *elegit* and of the inquisition. (*c*) If the sheriff's return does not state that he has set out a moiety by metes and bounds, it is bad, and the objection may be taken at the trial. (*d*) If a third person be in possession, the lessor of the plaintiff must prove not only his own title, but that of the debtor under whom he claims. (*e*)

In ejectment to recover lands, the lease of which had been taken in execution under a *fi. fa.* against a termor, by the plaintiff in the first action, (the present lessor of the plaintiff) to whom an assignment had been made by the sheriff, it was held not to be sufficient to prove the writ of *fi. fa.* without also proving the judgment. (*f*)

By conusee of statute merchant, or staple.

In ejectment by the conusee of a statute merchant against the conusor, the lessor of the plaintiff must prove the obligation of the conusor, or in case the obligation has been lost or damaged, a true copy from the roll in the custody of the clerk of recognisances, or his deputy, made and signed by him or his deputy, and duly proved, and in the next place the writ of extent must be proved. An examined copy of the writ of *capias si laicus*, does not appear to be necessary, as it is recited in the writ of extent. If a third person, and not the conusor, is in possession, in addition to these proofs the lessor of the plaintiff must give evidence of the conusor's title. (*g*)

In ejectment by the conusee of a statute staple, he must produce and prove, 1. The bond of the conusor, or in case of its loss or damage, a true copy from the roll in the custody of the clerk of recognisances, or his deputy, made and signed by the clerk or his deputy, and duly proved; and 2ndly the writ of *liberate*; but proof of the writ of extent appears not to be necessary, as that writ is recited in the *liberate*. If a third person be

(*a*) 2 Phill. Evid. 252, 6th edit. 2 Stark. Evid. 520.

(*b*) Ramsbottom v. Buckhurst, 2 M. and S. 565.

(*c*) *Ibid.*

(*d*) Masters v. Durrant, 1 B. & A. 40.

(*e*) 2 Phill. Evid. 252, 6th edit.

(*f*) Doe d. Bland v. Smith, Holt's N. P. C. 589. 2 Stark. N. P. C. 199, S. C.

(*g*) 2 Phill. Evid. 253, 6th edit.

in possession, proof of the conusor's title will also be required. (*a*) Of the evidence.

In ejectment by guardian in socage, the lessor of the plaintiff must prove the seisin of the ancestor of the heir, the fact of his leaving issue, his heir at law under the age of fourteen years, and that amongst those relations to whom the inheritance cannot descend, he himself is the next of blood to such issue. It seems also necessary to prove that the ward was under the age of fourteen at the time of the demise stated in the declaration. (*b*) In ejectment by a guardian appointed by deed or will according to stat. 12 C. 2, c. 24, s. 8, 9, the title of the deceased father must be proved, the minority of the ward at the time of the demise stated in the declaration, and the due execution of the will or deed. (*c*) By guardian.

The cause having been carried down to trial, if the defendant should not appear, or should refuse to confess lease, entry, and ouster, pursuant to the consent rule, the practice is to call the defendant, and on his non-appearance, or refusal to confess, to call the plaintiff and nonsuit him; after which, at the plaintiff's instance, the cause of the nonsuit is indorsed on the *postea*, which entitles the plaintiff to judgment against the casual ejector. (*d*) If there be several defendants, and some of them refuse to appear and confess, it is the practice to proceed against those who do appear, and enter a verdict for those who do not, indorsing upon the *postea* that such verdict is entered for them because they do not appear and confess, and the plaintiff's lessor will then be entitled to his costs against such defendants, and to judgment against the casual ejector for the lands in their possession. (*e*) Of the trial.

But in ejectment by landlord against tenant on the statute 1 G. 4, c. 87, s. 2, "Whenever it shall appear on the trial of any ejectment at the suit of a landlord against a tenant, that such tenant or his attorney hath been served with due notice of trial, the plaintiff shall not be nonsuited for default of the defendant's Stat. 1 G. 4, c. 87.

(*a*) 2 Phill. Evid. 254, 6th edit.

(*b*) 2 Phill. Evid. 250. See also Doe d. Rigge v. Bell, 5 T. R. 471. *Ante*, p. 514.

(*c*) 2 Phill. Evid. 251, 6th edit. 2 Stark. Evid. 521.

(*d*) Turner v. Barnaby, 1 Salk. 259. Tidd's Pr. 918, 8th edit. See *post*, as to the judgment.

(*e*) Claxmore v. Searle, 1 Ld. Raym. 729. Bul. N. P. 98. Tidd's Pr. 918, 8th edit.

Of the trial.

appearance, or of confession of lease, entry, and ouster; but the production of the consent rule and undertaking of the defendant, shall in all such cases be sufficient evidence of lease, entry, and ouster; and the judge, before whom such cause shall come on to be tried, shall, whether the defendant shall appear upon such trial or not, permit the plaintiff on the trial, after proof of his right to recover possession of the whole, or of any part of the premises mentioned in the declaration, to go into evidence of the mesne profits thereof, which shall or might have accrued from the day of the expiration or determination of the tenant's interest in the same, down to the time of the verdict given in the cause, or to some preceding day, to be specially mentioned therein, and the jury on the trial, finding for the plaintiff, shall in such case give their verdict upon the whole matter, both as to the recovery of the whole or any part of the premises, and also as to the amount of the damages to be paid for such mesne profits; provided always that nothing hereinbefore contained shall be construed to bar any such landlord from bringing an action of trespass, for the mesne profits which shall accrue from the verdict, or the day so specified therein, down to the day of the delivery of possession of the premises recovered in the ejectment."

"And in all cases in which such undertaking shall have been given, and security found as aforesaid, if upon the trial a verdict shall pass for the plaintiff, but it shall appear to the judge before whom the same shall have been had, that the finding of the jury was contrary to the evidence, or that the damages given were excessive, it shall be lawful for the judge to order the execution of the judgment to be stayed absolutely, till the fifth day of the term then next following, or till the next session, assises, or court day (as the case may be); which order the judge shall in all other cases make upon the requisition of the defendant, in case he shall forthwith undertake to find, and on condition that within four days from the day of trial, he shall actually find security, by the recognisance of himself, and two sufficient sureties, in such reasonable sum as the judge shall direct, conditioned not to commit any waste, or act in the nature of waste, or other wilful damage, and not to sell or carry off any standing crops, hay, straw, or manure produced or made (if any) upon the premises, and which may happen to be thereupon, from the day on which the verdict shall have been given, to the day on

which execution shall finally be made upon the judgment, or the same be set aside, as the case may be." Of the trial.

A trial at bar may be had in certain cases in ejectment, as where the property litigated is of great value, and difficulties are likely to arise in the course of the trial. It is said that the rule has been, not to allow a trial at bar, except where the yearly value of the land is 100*l.* (*a*), and value alone (*b*) or the probable length of the inquiry is not a sufficient ground for it. Difficulty must concur, and in order to obtain a trial at bar upon that ground, it is not sufficient to state in the affidavit to support the motion for such trial, that the cause is expected to be difficult, but the particular difficulty which is expected to arise, ought to be pointed out, in order that the court may judge whether it be sufficient (*c*); and in a modern case the court refused a trial at bar in ejectment, on the mere allegation of length and probable questions of difficulty, in a cause respecting a pedigree. (*d*) The court of Common Pleas has refused a trial at bar in this action, on a question of sanity, where it would have occasioned delay, and some of the witnesses were old and infirm, and not able to travel to Westminster. (*e*) But where on an application made by the defendant, it appeared that the lessor of the plaintiff was in such indigent circumstances as not to be able to bear the expense, and that one of his witnesses was a woman above eighty years of age, who might die, before a trial at bar could be had; the court granted the rule, but said that as it was a favour asked by the defendant, they would lay him under the terms, that if he succeeded, he should only have *nisi prius* costs, but that if the lessor of the plaintiff succeeded, he should have bar costs, and that the old witness should be examined upon interrogatories, and her depositions read if she should die before the trial. It was also (by consent) made part of the rule, that the cause should be tried by a Middlesex jury, instead of one from Norfolk, where the premises were situated. (*f*) So where the lessor of the plaintiff had obtained a rule for a trial at bar, but had discontinued the action and brought a new ejectment, the court Trial at bar.

(*a*) Goodright v. Wood, 1 Barnard. 141.

(*b*) Barnes, 447.

(*c*) R. v. Burgesses of Caermarthen, Say. 79. 2 Lill. Pr. Reg. 740. Goodright v. Wood, 1 Barnard. 141. Tidd's Pr. 807, 8th edit.

(*d*) Doe d. Angell v. Angell, T. 36 G. S. K. B. Tidd's Pr. 807, 8th edit.

(*e*) Barnes, 447.

(*f*) Holmes d. Brown v Brown, Dougl. 457.

Of the trial

would not grant him a second rule for a trial at bar, until he had paid the costs of the former ejectment. (*a*) So in a cause concerning rights of chase, involving documentary evidence of great length and antiquity, together with much oral testimony, the court of Common Pleas would not grant a trial at bar, a new trial having been recently refused in the King's Bench, where another defendant, who had contested the same rights, had obtained a verdict. (*b*) In ejectment a rule for a trial at bar may be applied for, before issue joined, which is not the case in other actions; but as the issue in ejectment is very seldom joined until after the end of term, it would afterwards be too late to make the application. (*c*)

When counsel for defendant shall begin.

The general rule is, that when the defendant claims as devisee, and admits that the lessor of the plaintiff is heir at law, the defendant is entitled to begin, and has the general reply. (*d*) So if the lessor of the plaintiff proves his pedigree and stops, and the defendant sets up a new case, which the lessor of the plaintiff answers by evidence, the defendant is entitled to the general reply (*e*), which is also the case where the lessor of the plaintiff claims under a will, and the defendant under a codicil *thereto*, the validity of which is the question between them, and the defendant admits the title of the lessor of the plaintiff under the will. (*f*)

Verdict.

The verdict in ejectment may be taken according to the title, and therefore where the declaration was for a fourth part of a fifth part, and the title of the lessor of the plaintiff was only to one-third of one-fourth of one-fifth, he was permitted to take a verdict according to his title. (*g*) So where the declaration was for a moiety of gavelkind lands, the lessor of the plaintiff was allowed to recover a third part only. (*h*)

A verdict in ejectment, as in other actions, will cure a title defectively set out; therefore, where in ejectment brought 1 Geo. 3, the demise was stated to have been made 33 Geo. 3, the court held it to be well enough, as there could be no doubt that a

(*a*) Lord Coningsby's case, 1 Str. 548.

(*b*) Lord Rivers v. Pratt, 1 B. and B. 265. 3 B. Moore, 582, S. C.

(*c*) Barnes, 455. Tidd's Pr. 908, 8th edit.

(*d*) Jackson v. Hesketh, 2 Stark. N. P. C. 520. Tidd's Pr. 908, 8th edit.

(*e*) *Ibid*, Goodtitle d. Revett v. Braham, 4 T. R. 497.

(*f*) Doe d. Corbett v. Corbett, 3 Campb. N. P. C, 368.

(*g*) Ablett d. Glenham v. Skinner, 1 Sid. 229. *Ante*, p. 582.

(*h*) Denn d. Burgess v. Purvis, 1 Burr. 326. *Ante*, p. 582.

Of the trial.

proper title was proved at the trial. (*a*) So where the demise was laid on 6th September, 2 Jac. and the ouster was that the defendant "*postea scilicet* 4 Sep. 2 Jac." ejected the plaintiff, after verdict, and on motion to arrest the judgment, it was held that the words "*scilicet* 4 Sep. 2 Jac." might be rejected as repugnant. (*b*)

After a verdict in ejectment for a messuage *and tenement*, the court will permit the lessor of the plaintiff to enter the verdict according to the judge's notes for the messuage only (pending a rule to arrest the judgment), without obliging him to release the damages. (*c*)

New trial.

It was not usual formerly to grant a new trial in ejectment, but for the sake of obtaining justice, a new trial may now be had in this, as well as in other actions. (*d*)

Of the judgment.

The judgment in ejectment is, that the plaintiff recover his term yet to come and unexpired, in the tenements with the appurtenances; and the effect of this judgment is to put him in possession of the premises according to the right and title which he has therein, and if he have no title he is then in as a trespasser. (*e*) But the judgment, even upon verdict, in ejectment, unlike all other actions, is no bar in a subsequent ejectment brought for the same lands, and between the same parties. (*f*) The courts will make every possible intendment in support of a judgment in ejectment, and if by any means whatever the plaintiff can be supposed to have a title, as laid in the declaration, after verdict the judgment will be held right. Thus where in a declaration two demises were alleged for the same term, both as to commencement and duration, by two different persons, of the same premises, and the judgment was that the plaintiff do recover his said *terms*; it was objected upon error that both the lessors could not have title at the same time, and therefore the plaintiff

(*a*) Small d. Baker v. Cole, 2 Burr. 1159.

(*b*) Adams v. Goose, Cro. Jac. 96, 429.

(*c*) Goodtitle d. Wright v. Otway, 8 East, 357; and see Wood v. Payne, Cro. Eliz. 186.

(*d*) Clymer v. Littler, 1 W. Bl. 348. Smith d. Dormer v. Parkhurst, 2 Str. 1105. Goodtitle d. Alexander v. Clayton, 4 Burr. 2224. Tidd's Pr. 936, 8th edit.

(*e*) Taylor d. Atkins v. Horde, 1 Burr. 114.

(*f*) Earl of Bath, v. Sherwin, 10 Mod. 1.

Of the judgment.

could not enter by virtue of both demises, so that upon his own shewing, he had no right to recover the two terms; but the court over ruled the objection, observing, that two leases for the same term of the same land might be good, as separate leases by two jointenants of the whole, which would pass the moiety of each. (*a*) So where the declaration contained two demises, each of an undivided third of the same estate, for the same term, but by different lessors, and the judgment was, that the plaintiff should recover his said *terms;* it was objected on error that the judgment being for the recovery of two undivided thirds (under a title explained by the facts disclosed in the bill of exceptions to be only for one undivided third, and confessed to be in fact to no greater extent) was erroneous. But the House of Lords overruled the objection, Mansfield, C. J. who delivered the opinion of the judges, observing, that the question did not come before the house by special verdict, but by bill of exceptions, so that what other evidence was given, besides that stated, did not appear; but that it did appear that a great deal of other evidence was given, and that for any thing that appeared, there might be a title to another undivided third of the estate. (*b*) Upon the same principle, where in an ejectment on two demises, the second of which was laid to be of other lands, it was objected on error that the judgment was only to recover his *term* (in the singular) the court said that it was "of and in the tenements aforesaid," which, *reddendo singula singulis*, was well enough, for there was but one term in each part of the premises. (*c*) So where an ejectment was brought upon two demises by different lessors, and the second demise was of the "premises aforesaid," and judgment was entered for the plaintiff as to the first demise, and for the defendant as to the second; it was objected, that as the second demise was not stated to be of "other tenements," the judgment was contradictory. The court affirmed the judgment, and said they would construe the "tenements aforesaid," which the second lessor demised, to mean the term in the premises. (*d*) And so where two demises were inserted, but only one *habendum*, (*habendum tenementa prædicta*, &c.) the court said that *reddendo singula singulis*, it was well enough. (*e*)

(*a*) Morris v. Barry, 1 Wils. 1. 2 Str. 1180; S. C.

(*b*) Rowe v. Power, 2 Bos. and Pul. N. R. 1, 36.

(*c*) Worral v. Bent, 2 Str. 835.

(*d*) Fisher v. Hughes, 2 Str. 907.

(*e*) Shabourne v. Bengo, 1 Ld. Raym. 561. Anon. 2 Vent. 214. Farsden v.

Of the judgment.

If the plaintiff obtain a verdict for the whole of the premises, the entry is, that the plaintiff recover his term against the defendant of and in the premises aforesaid, or that he recover possession of the term aforesaid (*a*), and this form is also used if a moiety or other part of the whole premises be recovered, for it is at the lessor's peril to take out execution for no more than that to which he has proved himself entitled. (*b*) But, where the verdict is for some parcels, and not for all, or part of all, as where the plaintiff declares for lands in A., and lands in B., and the defendant is found guilty of the trespass and ejectment in the lands in A. only, the judgment is, that the plaintiff recover his term in A., and as to the other part whereof the jury acquitted the defendant, that the plaintiff be in mercy, and that the defendant go thereof without day. (*c*)

For part of the premises.

Death of defendant.

If a sole defendant die after the commencement of the assises, and before verdict, or after verdict, and before judgment, it will not abate the suit, nor can his death be alleged for error, provided the judgment be entered within two terms after the verdict, according to 17 C. 2, c. 8, and when there are several defendants, and one of them dies before judgment, the lessor may proceed against the survivors, suggesting the death. (*d*) The entry of the judgment is general against the survivor, but execution must not be taken out for more than the plaintiff has a right to recover. (*e*) If the lessor proceed to trial, and take judgment against all the defendants without such suggestion it is error. (*f*)

If several defendants make a joint defence for the whole land demanded, and one of them dies, it is said that execution of the whole may be had, because the whole comes by survivorship to the other; but that where each of the defendants makes a defence for part only, the plaintiff upon the death of one of them must not take out execution for the part in his possession, because they are in the nature of distinct defendants, and consequently, as to that part which was defended by the person de-

Moore, Carth. 224. 1 Shower, 342, S. C.

(*a*) Gilb. Eject. 94, 2nd edit.

(*b*) *Ante*, p. 483, and *post*.

(*c*) Adams Eject. 293, 2nd edit. 1st Book of Judgm. 72. 2nd Book of Judgm. 120. Taylor v. Wilbore, Cro. Eliz. 768.

(*d*) Farr v. Denn, 1 Burr. 362. Tidd's Pr. 966, 8th edit.

(*e*) Farr v. Denn, 1 Burr. 362.

(*f*) Gilb. Eject. 98, 2nd edit.

Of the judgment.

ceased, there is no one in court against whom judgment can be given, or execution taken out. (*a*)

In ejectment against baron and feme, if between verdict and judgment the baron die, after a suggestion of the death, judgment may be entered against the wife. (*b*)

Time of signing judgment after nonsuit for not confessing.

When the plaintiff has been nonsuited at the trial on account of the defendant's not appearing and confessing lease, entry, and ouster, we have seen that the lessor of the plaintiff is entitled to sign judgment against the casual ejector (*c*), but, in the King's Bench, this judgment cannot be signed till the day in bank, or first day of the ensuing term (*d*), though it seems to be otherwise in the Common Pleas, where the plaintiff in such case has been allowed to sign judgment, and take out execution immediately after the trial (*e*), and in the King's Bench judgment may be regularly signed on the first day of the ensuing term, and a writ of possession delivered on the same day, though the *postea* be not delivered over at the time by the associate to the attorney for the plaintiff. (*f*)

Stat. 1 G. 4. c. 87.

In cases between landlord and tenant within the statute 1 Geo. 4, c. 87, the tenant undertakes, in case a verdict shall pass for the plaintiff, to give him a judgment to be entered up against the real defendant, of the term next preceding the time of trial. (*g*)

Of costs.

For the plaintiff.

On judgment by default against the casual ejector.

For not confessing.

When the action is undefended, and judgment is signed against the casual ejector by default, the only remedy which the lessor of the plaintiff has for his costs is an action of trespass for the mesne profits, in which the costs of the ejectment may be recovered as special damage. (*h*)

If the tenant appears, and enters into the consent rule, and at the trial refuses to confess, the lessor of the plaintiff must proceed for his costs by attachment on the consent rule, and can-

(*a*) Gilb. Eject. 98, 2nd edit. Adams Eject. 295, 2nd edit.

(*b*) Rigley v. Lee, Cro. Jac. 356. Gilb. Eject. 100, 2nd edit. Bac. Ab. Ejectment, (F).

(*c*) *Ante*, p. 597.

(*d*) Doe d. Palmerston v. Copeland, 2 T. R. 779. Tidd's Pr. 1079, 6th edit.

(*e*) Throgmorton d. Fairfax v. Bentley, 2 T. R. 780, (a).

(*f*) Doe d. Davis v. Roe, 1 B. and C. 118. 2 Dowl. and Ryl. 229, S. C. Tidd's Pr. 1079, 6th edit.

(*g*) *Ante*, p. 569.

(*h*) See *post*, in title, "Trespass for mesne profits."

Of costs.

For the plaintiff.

not take out execution against the tenant, for the judgment is entered against the casual ejector, and not against the tenant. (*a*)

Each defendant is answerable for the whole costs; and where the defendants defend severally, and at the trial one appears and confesses, but the other does not, the whole costs may be taxed against each; against him who appeared and confessed, on the *postea*, and against those who did not appear, on the consent rule; and, if after the plaintiff has had satisfaction from one of the defendants he should proceed against the others, the latter must apply to the court to be relieved. (*b*)

If the lessor of the plaintiff dies before the commission-day of the assises, and the plaintiff is nonsuited on account of the defendant's not confessing, the representatives of the lessor cannot recover any costs, for the consent rule is merely personal, and does not extend to the representative (*c*), but, when the costs had been taxed upon the common rule by consent, they were ordered to be paid by the tenant to the representatives of the lessor of the plaintiff who had died after the trial. (*d*)

On judgment after verdict.

When there is a verdict and judgment against the tenant, execution may be taken out, or an action brought for the costs, and the *ca. sa.* on *fi. fa.* for the costs, and the *habere facias possessionem* for the possession, may be issued separately or together. (*e*)

Where an ejectment was brought against a feme-sole, who married before trial, and verdict and judgment were entered against her by her original name, an *hab. fac. pos.* and *fi. fa.* against her, by the same name, were held regular, though the *fi. fa.* was inoperative. (*f*)

When the landlord is made defendant, and appears at the trial, and confesses, and a verdict is given against him, judgment may, it is said, be entered up thereon, and execution issued against him for the costs, without applying to the court. (*g*)

For the defendant.

When a verdict is found for the defendant, or the plaintiff is nonsuited for any other cause than the defendant's refusal to

(*a*) Turner v. Barnaby, 1 Salk. 259. Barnes, 182. Tidd's Pr. 1028, 8th edit.

(*b*) Bull. N. P. 335. Barnes, 149.

(*c*) Thrustout v. Bedwell, 2 Wils. 7; and see Doe d. Pain v. Grundy, 1 B. and C. 284.

(*d*) Barnes, 119.

(*e*) Tidd's Pr. 1027, 8th edit. Adams Eject. 297, 2nd edit.

(*f*) Doe d. Taggart v. Butcher, 3 M. and S. 557.

(*g*) *Per curiam*, 56 G. 3, K. B. Tidd, 1034, 8th edit. *sed quære*, it being usual to apply to the court to take out execution against the casual ejector, as well after verdict as nonsuit. *Ibid.*

Of costs.

For the defendant.

confess, the defendant may recover his costs by attachment against the lessor of the plaintiff. (*a*) The course in the King's Bench is said to be to tax the costs on the *postea*, as in other actions, and then to sue out a *ca. sa.* or *fi. fa.* for the same against the nominal plaintiff, and if, upon shewing this writ to the lessor, serving him with a copy of the consent rule, and demanding the costs, the lessor refuse to pay them, the court will, on an affidavit of the facts, grant an attachment against him. (*b*)

In the Common Pleas no writ of execution is issued against the nominal plaintiff, but the prothonotary taxes the costs upon the postea, and marks them upon the consent rule, and, unless after service of the consent rule and demand of the costs, the lessor of the plaintiff pay the same, the defendant, on an affidavit of the facts, may have an attachment. (*c*)

Attachment.

In proceeding by attachment, a copy of the rule, with the officer's *allocatur* thereon, should be personally served on the party liable to the payment of costs, to whom the rule should be shewn, and a demand of payment made, and, when the costs are ordered to be paid to the attorney, the demand may be by the acting attorney in the cause, although he act in the name of another attorney. Upon an affidavit of such demand, &c. and of the lessor's refusal to pay the costs, an attachment may be obtained. (*d*) If the lessor of the plaintiff be a peer, the attachment does not issue against his person, but only against his goods and chattels. (*e*)

One of several defendants acquitted.

By statute 8 and 9, W. 3, c. 11, s. 1, it is enacted, that where several persons shall be made defendants to any action of *ejectione firmæ*, and any one or more of them shall, upon the trial thereof, be acquitted by verdict, he shall recover his costs of suit, unless the judge shall certify that there was a reasonable cause for making such a person defendant. (*f*)

(*a*) Tidd's Pr. 1028, 8th edit. So for not proceeding to trial pursuant to notice. Comb. 102. Hull. Costs, 415.

(*b*) Adams Eject. 298, 2nd edit. 2 Archb. Pr. 52; but *quære* whether it would not be sufficient to proceed as in the Common Pleas. See *post*.

(*c*) Doe d. Prior v. Salter, 3 Taunt. 485. Adams Eject. 298, 2nd edit.

(*d*) Tidd's Pr. 1028, 8th edit. Imp. C. B. 654, 5th edit.

(*e*) Thornby v. Fleetwood, Ca. Pr. C. P. 7.

(*f*) Tidd's Pr. 1023, 8th edit. The provisions of this statute, says Mr. Adams, (p. 299,) seem scarcely applicable to the present mode of conducting ejectments; for how can it be said, that he who was made defendant at his own request, was made so without good cause.

Of costs.

For the defendant.

If the lessor of the plaintiff die after issue joined, and before trial, or even after trial, and before payment of costs, the defendant cannot recover his costs against the lessor's representative, for the consent rule is merely personal. (*a*)

Baron and feme lessors.

Where baron and feme are lessors of the plaintiff, and the baron dies after entering into the consent rule, the feme is liable to the payment of costs. (*b*)

Infant lessor.

Where the lessor of the plaintiff is an infant, he is not liable to costs, and therefore the practice is to stay the proceedings until some responsible person undertake for payment of the costs. (*c*) So where the lessor of the plaintiff is resident abroad or dead. (*d*)

If the lessor of the plaintiff abandon the action before joining in the consent rule, the defendant cannot recover any costs against him. (*e*) If he sue *in formâ pauperis*, and is guilty of any vexatious delay, the court will dispauper him. (*f*)

Where there are several defendants who succeed in the action, the lessor of the plaintiff may pay costs to which of them he pleases. (*g*)

If a writ of error is apprehended, the lessor of the plaintiff may sue out an *habere facias possessionem* without waiting to tax his costs, so as prevent the writ of error from operating as a *supersedeas*. (*h*)

Stat. 1 *G.* 4, *c.* 87.

By statute 1 Geo. 4, c. 87, s. 6, in all cases wherein the landlord shall elect to proceed in ejectment under the provisions thereinbefore contained, and the tenant shall have found bail, as ordered by the court, then if the landlord upon the trial of the cause shall be non-suited, or a verdict pass against him on the merits of the case, there shall be judgment against him with double costs.

Of the execution.

The execution in ejectment is by a writ of *habere facias possessionem*, or writ of possession, as it is usually called, for the land,

(*a*) Doe d. Pain v. Grundy, 1 B. and C. 284. Thrustout v. Bedwell, 2 Wils. 7. Doe d. Lintot v. Ford, 2 Smith, 407.

(*b*) Morgan v. Stapely, 1 Keb. 827.

(*c*) Anon. 1 Wils. 130. B. N. P. 111. Tidd's Pr. 578, 8th edit.; and see *post*. But see Anon. 1 Freem. 373.

(*d*) Tidd's Pr. *ubi sup.*

(*e*) Smith v. Barnardiston, 2 W. Bl. 904; but the court will stay proceedings in a second ejectment till such costs are paid. *Ibid.*

(*f*) Doe d. Leppingwell v. Trussell, 6 East, 505.

(*g*) Jordan v. Harper, 1 Str. 516.

(*h*) Doe d. Messiter v. Dyneley, 4 Taunt. 289. Tidd's Pr. 1031, 1060, 8th edit.

Of the execution.

and by *fieri facias*, or *capias ad satisfaciendum* for the costs. As the mode of recovering the costs has been already considered, the following observations are confined to the writ of possession.

Entry by lessor.

After a recovery in ejectment, the lessor of the plaintiff may enter upon the land, without issuing a writ of possession, and such entry will execute the judgment in the same manner as the entry of a demandant in a real action. (*a*) But it is usual in all cases to issue a writ of possession.

Where landlord has been admitted tenant,

Where the landlord has been admitted to defend on the tenant's non-appearance, according to 11 G. 2, c. 19, s. 13, and judgment has been signed against the casual ejector (*b*), with a stay of execution until further order, and the lessor of the plaintiff is afterwards nonsuited at the trial, on account of the landlord not confessing lease, entry, and ouster, the lessor must apply to the court for leave to take out execution against the casual ejector. (*c*) The rule for this purpose is to shew cause in the King's Bench (*d*), but in the Common Pleas it is absolute in the first instance. (*e*)

If the lessor of the plaintiff lose his right of possession before the time of issuing execution, he cannot have a writ of possession. (*f*)

Form of the writ, &c.

The writ of *habere facias possessionem* is directed to the sheriff of the county where the lands lie, and after reciting the judgment, commands him, without delay, to cause the plaintiff to have possession of his term, of and in the tenements recovered. After verdict and judgment against the tenant, a *fi. fa.* or *ca. sa.* for the damages and costs may be included in the same writ. The writ of possession, for which there is a *præcipe* in the King's Bench, but not in the Common Pleas, is made returnable on a general return day, if the proceedings be by original, or on a day certain, if by bill, and after being signed and sealed, is delivered to the sheriff, who makes out a warrant thereon directed

(*a*) Badger v. Floid, 12 Mod. 398. Anon. 2 Sid. 156. Taylor d. Atkins v. Horde, 1 Burr. 88, *arg.* *Ante*, p. 341.

(*b*) See *ante*, p. 578.

(*c*) Jones v. Edwards, 2 Str. 1241. Barnes, 182. Tidd's Pr. 1034, 8th edit. See *ante*, p. 605, as to taking out execution against the landlord after verdict.

(*d*) Doe d. Roberts v. Gibbs, 1 Chitty's R. 47. Doe d. Simons v. Masten, *Ib.* 233.

(*e*) Barnes, 182, 3, 5. Imp. C. P. 649, 5th edit. Tidd's Pr. 1034, 8th edit.; but see 1 Chitty's R. 233.

(*f*) Doe d. Morgan v. Black, 3 Camp. N. P. C. 449. *Ante*, p. 497.

to his officer. It is usual for the lessor of the plaintiff to give the sheriff an indemnity for executing the writ. (*a*) Of the execution.

The execution should pursue the judgment, and therefore in ejectment against a woman who married before trial, where judgment was signed against her by her maiden name, a writ of possession against her by the same name was held regular. (*b*)

Under this writ, the sheriff or his officer, by the direction of the lessor of the plaintiff or his attorney (*c*), delivers possession of the premises recovered, and such possession is a full and actual possession. He is therefore justified, where a house is recovered, and he is denied entrance, in breaking open the door. (*d*) Where several messuages are recovered, the mode of delivering possession is the same as upon an *habere facias seisinam*. (*e*) The surest and best way is said to be, where there are several houses or lands in the occupation of different tenants, for the sheriff to remove all the tenants entirely out of each house, or from off each parcel of land, and when the possession is quitted, to deliver it to the plaintiff (*f*); though where several houses or parcels of land are in the occupation of the same tenant, the safest way for the sheriff is to give the plaintiff possession of one house or parcel of land in the name of the whole, for he executes the writ at his peril, and therefore if he gives possession of any messuage or land not recovered, and not included in the writ of possession, he is a trespasser. (*g*) If the sheriff turns out all the persons he can find in the house, and gives the plaintiff, as he thinks, quiet possession, and after the sheriff is gone, some persons who were lurking in the house expel the plaintiff, this is no execution, and the plaintiff may have a new writ of possession. (*h*) If the execution be for twenty acres, it seems the sheriff must deliver twenty acres according to the estimation of the county where the land lies. (*i*) Where land, part of a highway, is recovered in ejectment, Mode of executing it.

(*a*) Tidd's Pr. 1080, 8th edit. Gilb. Eject. 110, 2nd edit. Com. Dig. Execution, (A. 5).

(*b*) Doe d. Taggart v. Butcher, 3 M. and S. 557.

(*c*) Crocker v. Fothergill, 2 B. and A. 660.

(*d*) Semayne's case, 5 Rep. 91, b. Gilb. Eject. 108, 2nd edit. Com. Dig. Execution, (A. 5).

(*e*) *Ante*, p. 343.

(*f*) Gilb. Eject. 108, 2nd edit. Tidd's Pr. 1081, 8th edit.

(*g*) Gilb. Eject. 109, 2nd edit. Tidd's Pr. 1081, 8th edit.

(*h*) Upton v. Wells, 1 Leon. 145. Gilb. Eject. 109, 2nd edit.

(*i*) Gilb. Eject. 110, 2nd edit. *Ante*, p. 343.

Of the execution.

the sheriff should deliver possession, subject to the right of passage over it, for the king and his people. (*a*)

It is at the peril of the lessor of the plaintiff to take more than he is entitled to, and if he do so, the court on motion will order it to be restored. (*b*)

Disturbance of sheriff, and new writ.

If the sheriff is disturbed in executing the writ of possession, the court, on an affidavit, will grant an attachment against the party, whether he be a defendant or a stranger. (*c*) The writ is not understood to be executed, till the sheriff is gone and the plaintiff left in quiet possession. (*d*) And after possession given, either under the writ or by agreement of the parties, if the defendant immediately, or soon after the possession is delivered, and before the return of the writ, turn the plaintiff out of possession, the latter may, it has been said, have a new writ of possession (*e*), because the defendant himself shall never, by his own act, keep the possession which the plaintiff received from him by due course of law. (*f*) But where a stranger turns the plaintiff out of possession, the latter cannot have a new *hab. fac.* (*g*); and in any case if the *habere facias* has been returned, though not filed, it seems that no new writ can issue, because when returned, the *habere facias* becomes a record, to which the court is entitled. (*h*) The authority of the earlier decisions, respecting the issuing of a new writ of possession, after execution executed, has been considerably shaken by what fell from the court in a late case in the Common Pleas. (*i*) The plaintiff having been put into possession of the premises, by virtue of a writ of *habere facias*, on the 22nd February, 1806, was expelled by the defendant in October, 1807. On an application for a new writ of possession, the court denied the authority of the case in Keble, and held that possession having been given under the first writ, the sheriff ought to have returned that he had given possession, and that the plaintiff could not afterwards have another writ. An *alias*,

(*a*) Goodtitle d. Chester v. Alker, 1 Burr. 133.

(*b*) Cottingham v. King, 1 Burr. 629. Roe d. Saul v. Dawson, 3 Wils. 49. *Ante*, p. 483.

(*c*) 2 Brownl. 216, 253. Kingsdale v. Mann, 6 Mod. 27. 1 Salk. 321, S.C. Gilb. Eject. 112, 2nd edit. Tidd's Pr. 1082, 8th edit.

(*d*) Gilb. Eject. 112, 2nd edit.

(*e*) Radcliffe v. Tate, 1 Keb. 779. Kingsdale v. Mann, 6 Mod. 27. 1 Salk. 321, S. C. Goodright v. Hart, 2 Str. 830.

(*f*) Gilb. Eject. 112, 2nd edit.

(*g*) *Ib.*

(*h*) 2 Brownl. 216, 253. Tidd's Pr. 1082, 8th edit.

(*i*) Doe d. Pate v. Roe, 1 Taunt. 55.

it was said, could not issue after the writ was executed; if it could, the plaintiff, by omitting to call on the sheriff to return the writ, might retain the right of suing out a new *habere facias possessionem*, as a remedy for any trespass which the same tenant might commit within twenty years next after the date of the judgment. Of the execution.

Though formerly doubted, it is now settled that a *scire facias* lies, and is necessary, to revive a judgment in ejectment, after a year and a day. (*a*) After judgment against the casual ejector, the *scire facias* should go against the terre-tenants, as well as the defendant. (*b*) In a late case where it appeared that the lessor of the plaintiff had neglected to sue out a writ of possession, for more than twenty years after the recovery in ejectment, and in the meantime, there had been several changes of the property and possession, the court of King's Bench refused to permit the term in the declaration to be enlarged, for the purpose of suing out a *sci. fa.* to revive the judgment. (*c*) But if the plaintiff's delay was caused by a writ of error or injunction out of Chancery, no *scire facias* will be necessary. (*d*) When *sci. fa.* necessary. After a year and day.

In ejectment the original parties being merely nominal, there is no occasion for a *sci. fa.* on the death of either of them, should they be real persons. (*e*) It also seems to be unnecessary in case of the death of the lessor of the plaintiff before execution, for he is not a party to the judgment. (*f*) And where the writ of possession was tested in his lifetime, though it was not actually sued out until after his death, the court of King's Bench held the execution to be regular. (*g*) On death of party.

When the real defendant dies after judgment and before execution, it has been doubted whether a *sci. fa.* is necessary, because the execution is of the land only, and no new person is charged (*h*), but the surer method is said to be to sue out a *sci. fa.* (*i*) The *sci. fa.* must issue against the terre-tenants (and the heir may come in as terre-tenant) and not against the executor

(*a*) Withers v. Harris, 2 Ld. Raym. 806, 1 Salk. 258, S. C. Procter v. Johnson, 2 Salk. 600. Bac. Ab. Execution, (H). Tidd's Pr. 1154, 8th edit. Gilb. Eject. 103, 2nd edition.

(*b*) Withers v. Harris, 1 Salk. 258. Proctor v. Johnson, 1 Ld. Raym. 669. 2 Salk. 600, S. C.

(*c*) Doe d. Reynell v. Tuckett, 2 B. and A. 773. 1 Chitty's R. 535, S. C. *Ante*, p. 553.

(*d*) Tidd's Pr. 1156, 8th edit.

(*e*) Tidd's Pr. 1171, 8th edit.

(*f*) *Id.* 1172.

(*g*) Doe d. Beyer v. Roe, 4 Burr. 1970.

(*h*) *Per* Holt, C. J. in Withers v. Harris, 2 Ld. Raym. 808.

(*i*) Adams Eject. 307, 2nd edit.

Of the execution.

without naming him terre-tenant; but where the costs are sought to be recovered upon a judgment after verdict, a *sci. fa.* must be sued out against the executor, to warrant the execution. (*a*)

If the defendant die after the writ of possession is taken out, it may still be executed by the sheriff. (*b*)

Of error.

By whom.

A writ of error cannot be brought in the name of the casual ejector (*c*), and it cannot therefore be brought by the tenant, unless upon a judgment after verdict, for in other cases the judgment is against the casual ejector.

Landlord.

It is said, however, that where a landlord defends alone, and a verdict is found against him, error may be brought, notwithstanding the judgment upon which the execution issues is entered against the casual ejector (*d*); and the reason is said to be, because a judgment is also in existence against the landlord, and upon that judgment the writ of error may be taken out in the landlord's name. (*e*) But in order to render the writ of error effectual, the landlord ought to shew it as cause against the rule for taking out execution against the casual ejector, for if he omit to do this, and suffer execution to be executed, the court will not afterwards on motion order such execution to be set aside. (*f*)

The statute of 16 and 17 Car. 2, c. 8, s. 3, which requires bail in a writ of error brought on a judgment in ejectment, has been already mentioned. (*g*)

Upon this statute it has been held, that the plaintiff in error may either enter into a recognisance himself, without any bail, or he may procure two responsible persons to become bail. (*h*) In the King's Bench the practice is said to be for the plaintiff in error, or his bail, to enter into a recognisance in *double* the improved rent or yearly value of the premises, and single amount of costs. (*i*) In the Common Pleas the clerk of the er-

(*a*) *Ib.* Tidd's Pr. 1172, 8th edit.

(*b*) O. Bridgm. 468, 9.

(*c*) Barnes, 181, 189. 2 Sell. Pr. 205.

(*d*) George d. Bradley v. Wisdom, 2 Burr. 756. Jones v. Edwards, 2 Str. 1241. Barnes, 208. 2 Sell. Pr. 205.

(*e*) Adams Eject. 308, 2nd edit. As to entering up judgment against the landlord, see Tidd's Pr. 1034, 8th edit.

(*f*) George d. Bradley v. Wisdom, 2 Burr. 756.

(*g*) *Ante*, p. 349, and see stat. 6 Geo. 4, c. 96.

(*h*) Barnes v. Bulwer, Carth. 121. Barnes, 75, 78, 212. Keene d. Lord Byron v. Deardon, 8 East, 298. Tidd's Pr. 1211, 8th edit.

(*i*) Keene d. Lord Byron v. Deardon, 8 East, 298; but in Thomas v. Goodtitle, 4 Burr. 2502, the recogni-

Of error.

rors governs himself in fixing the penalty of the recognisance by the amount of the rent of the premises, and takes the recognisance in *two* years rent or profits, and *double* costs, and in that court the plaintiff in error is not bound to give the defendant in error notice of his entering into the recognisance. (*a*) In the King's Bench, the plaintiff in error cannot be examined as to his sufficiency, though when bail in error is put in, notice thereof should, it seems, be given, and the bail may be examined as in other cases. (*b*) In the Exchequer, the bail must justify in double the improved rent, or value of the premises recovered. (*c*) Bail in error are not chargeable for the mesne profits in an action upon the recognisance, until they have been ascertained by writ of inquiry, pursuant to the statute 16 and 17 Car. 2, c. 1, s. 4. (*d*)

If the plaintiff, after obtaining judgment in ejectment, sue out a writ of *habere facias possessionem*, without waiting to tax his costs (the amount of which must be known before the penalty of the recognisance in error can be fixed), the allowance of a writ of error will not operate as a supersedeas. (*e*)

Where the defendant had brought a writ of error in Parliament, the court obliged him to enter into a rule not to commit waste or destruction, during the pendency of the writ of error. (*f*)

After a recovery in ejectment and writ of error brought, the lessor of the plaintiff may peaceably enter, if he find the possession vacant, for the writ of error binds the court, but not the right of the party. (*g*)

In ejectment by landlord against tenant, on statute 1 Geo. 4, c. 87, where a recognisance shall have been entered into, pursuant to the provisions of that act, not to commit any waste, &c. it is provided, " that such recognisance shall immediately stand discharged, and be of no effect in case a writ of error shall be brought upon such judgment, and the plaintiff in such writ shall become bound, with two sufficient sureties, unto the defendant in

sance was taken in double the rent only. Tidd's Pr. 1212, 8th edit.

(*a*) Doe d. Webb v. Goundry, 7 Taunt. 427. 1 B. Moore, 118, S. C.

(*b*) Keene d. Lord Byron v. Deardon, 8 East, 298.

(*c*) Tidd's Pr. 1212, 8th edit.

(*d*) Doe v. Reynolds, 1 M. and S. 247. See Doe v. Roache, Ca. Temp. Hard. 373.

(*e*) Doe d. Messiter v. Dyneley, 4 Taunt. 289.

(*f*) Wharod v. Smart, 5 Burr. 1823, and see stat. 1 G. 4. c. 87. *Ante*, p. 598.

(*g*) Badger v. Floyd, 12 Mod. 398. Withers v. Harris, 2 Ld. Raym. 808.

Of error.

the same, in such sum and with such condition, as may be conformable to the provisions respectively made for staying execution, or bringing writs of error upon judgment in actions of ejectment, by an act passed in England in the sixteenth and seventeenth years of the reign of king Charles II. and by an act passed in Ireland in the seventeenth and eighteenth years of the reign of the same king, which acts are respectively entitled, "*An act to prevent arrests of judgment, and superseding executions.*"

Of staying proceedings.

There are certain cases in which the courts will stay the proceedings in ejectment either for a time or finally; as until the plaintiff delivers particulars of the lands which he seeks to recover; or in certain cases until security for costs is given; or until the costs of a former ejectment are paid, where two ejectments are depending at the same time; and lastly at the instance of a mortgagor under statute 7 G. 2, c. 20, s. 1.

Until particulars are delivered.

Where the ejectment is brought on the forfeiture of a lease, the court will compel the plaintiff to deliver a particular of the breaches of covenant on which he means to rely, and if the plaintiff declares generally, and the defendant has any doubt what lands the plaintiff means to proceed for, he may call upon him by a judge's order to specify them (*a*), and in the mean time all proceedings will be stayed.

Until security given for costs.

Where the lessor of the plaintiff is an infant, the court will stay proceedings until security is given for costs, unless a responsible person has been made the plaintiff in the suit, or unless the father or guardian has undertaken to pay them. (*b*) So where the lessor of the plaintiff is abroad (*c*) or dead. (*d*) And where the lessor of the plaintiff, or the plaintiff himself is unknown to the defendant, the latter may call for an account of the lessor's or plaintiff's residence or place of abode from the opposite attorney, and if he refuse to give it, or give a fictitious account of a person who cannot be found, the courts will stay the proceedings until security is given for the payment of costs. (*e*) The

(*a*) Doe d. Birch v. Philips, 6 T. R. 597. Tidd's Pr. 643, 8th edit. Goodright v. Rich, 7 T. R. 332.

(*b*) Noke v. Windham, 1 Str. 693. Throgmorton d. Miller v. Smith, 2 Str. 932. Anon. 1 Wils. 130., Anon. Cowp. 128.

(*c*) Bull. N. P. 111. Denn d. Lucas v. Fulford, 2 Burr. 1177.

(*d*) Thrustout d. Turner, v. Grey, 2 Str. 1056. Barnes, 147.

(*e*) Tidd's Pr. 578, 8th edit.

poverty of the lessor is no ground for staying proceedings until security is given for the costs. (*a*)

Of staying proceedings.

In a second ejectment, the courts will stay the proceedings, until the costs of a prior one for the trial of the same title are paid (*b*), and also the costs of an action, if any has been brought, for the mesne profits (*c*), but not the damages in such action. (*d*) It is immaterial whether the second ejectment be brought by the lessor of the plaintiff, or by the defendant in the former ejectment (*e*), or between the same parties, so as it be on the same title (*f*); or for the same or different premises, so as it be on the same title (*g*), and for part of the same estate (*h*); nor whether it be brought in the same, or a different court. (*i*) The only question in these cases is, whether the second ejectment is in substance brought to try the same title. (*k*) The length of time which has elapsed between the first and second ejectment is not material. (*l*) The rule will be granted whether the merits were decided in the first action, or whether a judgment of nonsuit or non-pros was given.

Until costs of former ejectment paid.

Where the conduct of the party against whom the application is made has been vexatious and oppressive, the courts will stay the proceedings in a second ejectment, until the costs of a former ejectment are paid, though the party be not liable to the costs of that action, as where, being lessor, he has refused to enter into the consent rule, and has been afterwards nonpross'd for want of a replication. (*m*)

The rule to stay proceedings until the costs of a former ejectment are paid, is not inflexible, and it will not, as it seems, be granted where the verdict in the former ejectment was obtained by fraud and perjury. (*n* So the court will not stay proceed-

(*a*) Goodright d. Jones v. Thrustout, Ca. Pr. C. P. 15.

(*b*) Anon. 1 Salk. 255. Barnes, 133. Tidd's Pr. 582, 8th edit.

(*c*) Doe d. Pinchard v. Roe, 4 East, 585.

(*d*) Doe d. Church v. Barclay, 15 East, 232.

(*e*) Thrustout d. Williams v. Holdfast, 6 T. R. 223. Doe d. Walker v. Stevenson, 3 Bos. and Pul. 22.

(*f*) Keene d. Angel v. Angel, 6 T. R. 740. Doe d. Feldon v. Roe, 8 T. R. 645.

(*g*) Tidd's Pr. 583, 8th edit.

(*h*) Keene d. Angel v. Angel, 6 T. R. 740.

(*i*) Barnes, 133. Doe d. Chadwick v. Law, 2 W. Bl. 1158. Tidd's Pr. 583, 8th edit.

(*k*) *Per* Lord Kenyon, 6 T. R. 740.

(*l*) Keene d. Angel v. Angel, 6 T. R. 740. Thrustout d. Williams v. Holdfast. *Id.* 223.

(*m*) Smith d. Ginger v. Barnardiston, 2 W. Bl. 904. Doe d. Hamilton v. Hatherley, 2 Str. 1152.

(*n*) Doe d. Rees v. Thomas, 2 B. and C. 622. 4 D. and R. 145, S. C.

Of staying proceedings.

ings until the taxed costs of a suit in equity brought by the same party for the recovery of the same premises are paid. (*a*) And where a rule has been obtained for staying the proceedings till the costs of a former ejectment have been paid, the court will not interfere and permit the defendant, in case those costs are not paid before a certain day, to be named by the court, to *non-pros* the second ejectment. (*b*) So the court will not stay proceedings in the second action, where the party against whom the application is made is already in custody, on an attachment for non-payment of the costs of the first action. (*c*)

This rule should be moved for early in the action, and it will be granted even before the defendant has appeared. (*d*) In one case it was granted after notice of trial in the second ejectment had been given, and the plaintiff had been at the expense of preparing for trial and bringing his witnesses to town. (*e*)

Where two ejectments are depending at the same time.

Where the lessor of the plaintiff brings two actions of ejectment for the same premises at the same time in different courts, the proceedings in one of the actions will be staid until the other is determined. (*f*)

Where several ejectments are brought in the same court for the *same* premises upon the same demise, the court on motion, or a judge at chambers, will order them to be consolidated. (*g*) And though where the ejectments are brought for *different* premises, the court will not, as it seems, consolidate them (*h*), yet in a modern case, where thirty-seven ejectments had been brought against several tenants of different houses in the same street on the same demise, Lord Kenyon, C. J. on a rule to shew cause why the proceedings in all the causes should not be stayed, and abide the event of a special verdict in one of them, said it was a scandalous proceeding; that they all depended on precisely the same title, and ought to be tried by the same record, and the rule was made absolute. (*i*)

When the party against whom a verdict in ejectment has been

(*a*) Doe d. Williams v. Winch, 3 B. and A. 602.

(*b*) Doe d. Sutton v. Ridgway, 5 B. and A. 523.

(*c*) Barnes, 180.

(*d*) Adams Eject. 320, 2nd edit.

(*e*) Doe d. Chadwick v. Law, 2 W. Bl. 1158.

(*f*) Thrustout d. Park v. Troublesome, Andr. 297. Tidd's Pr. 572, 8th edit.

(*g*) Barnes, 176. Tidd's Pr. 666, 8th edit.

(*h*) Smith v. Crabbe, 2 Str. 1149. Medlicot v. Brewster, 2 Keb. 524.

(*i*) Doe d. Pulteney v. Freeman, T. 30 G. 3, K. B. 2 Sel. Pr. 229, 1st edit. Tidd's Pr. 666, 8th edit.

obtained, brings a writ of error, and pending that writ commences a second ejectment, the court will order the proceedings in the second ejectment to be staid until the writ of error is determined. And it seems also, that if it do not appear to the court that the writ of error was brought with some other view, than to keep off the payment of costs, proceedings will be staid until the costs of the first action are paid, though such costs are suspended by the writ of error. (*a*)

Of staying proceedings.

By statute 7 Geo. 2, c. 20, s. 1, it is enacted, that where an ejectment is brought by a mortgagee, his heir, executor, &c. for the recovery of the possession of any mortgaged lands, tenements or hereditaments, and no suit shall be then depending in any court of equity, for or touching the foreclosing or redeeming of such mortgaged lands, tenements, or hereditaments, if the person or persons having right to redeem such mortgaged lands, &c. and who shall appear or become defendant or defendants in such action, shall at any time pending such action, pay unto such mortgagee or mortgagees, or in case of his, her, or their refusal, shall bring into court, where such action shall be depending, all the principal monies and interest due on such mortgage, and also all such costs as have been expended in any suit or suits at law, or in equity, upon such mortgage, (such money for principal, interest, and costs, to be ascertained and computed by the court, where such action is or shall be depending, or by the proper officer by such court to be appointed for that purpose), the monies so paid to such mortgagee or mortgagees, or brought into such court, shall be deemed and taken to be in full satisfaction and discharge of such mortgage; and the court shall and may discharge every such mortgagor or defendant, of and from the same accordingly, and shall and may, by rule or rules of the same court, compel such mortgagee, or mortgagees, at the costs and charges of such mortgagor or mortgagors, to assign, surrender, or re-convey such mortgaged lands, &c. and such estate and interest as such mortgagee or mortgagees have or hath therein, and deliver up all deeds, evidences, and writings, in his, her, or their custody, relating to the title of such mortgaged lands, &c. unto such mortgagor or mortgagors, who shall have paid or brought such monies into the court, his, her, or their heirs, executors, or ad-

At instance of mortgagor on stat. 7 G. 2, c. 20.

(*a*) Fenwick v. Grosvenor, 1 Salk. 258. Grumble v. Bodilly, 1 Str. 554. Adams Eject. 321, 2nd edit. Tidd's Pr. 575, 8th edit.

Of staying proceedings.

ministrators, or to such other person or persons, as he, she, or they shall for that purpose nominate or appoint.

By sec. 3, it is provided, that the act shall not extend to any case where the person or persons against whom the redemption is prayed, shall (by writing under his, her, or their hands, or the hand of his, her, or their attorney, agent, or solicitor, to be delivered before the money shall be brought into such court at law, to the attorney or solicitor for the other side) insist, either that the party praying a redemption, has not a right to redeem, or that the premises are chargeable with other or different principal sums, than what appear on the face of the mortgage, or shall be admitted on the other side, nor to any case where the right of redemption to the mortgaged lands and premises in question, in any cause or suit, shall be controverted or questioned by or between different defendants in the same cause or suit, nor shall be any prejudice to any subsequent mortgagee or mortgagees, or subsequent incumbrancer.

The mortgagor must become tenant and appear, before he can take advantage of this statute, and therefore, if a mortgagee recover possession of the mortgaged premises, under a judgment in an undefended ejectment, the court has no jurisdiction to restore possession to the mortgagor, who has not appeared, on payment of the principal, interest, and costs. (*a*) But if the recovery is had against a tenant of the mortgagor, the court will set aside the judgment, and let in the mortgagor to defend as landlord, that he may be in a condition to apply to the court to stay proceedings on the terms of the statute (*b*), as in the following case. A mortgagee made a will, leaving all his property to executors upon certain trusts, and died, and his will was disputed by his heir in the prerogative court, but by the sentence of that court established, and letters testamentary in consequence granted to the executors. After this grant the heir appealed to the court of delegates against the sentence of the prerogative court, pending which appeal the executors assigned the mortgage to the lessor of the plaintiff, who, pending the appeal, brought an ejectment against the mortgagor for the recovery of the mortgaged premises. To this ejectment the mortgagor did not appear, but suffered judgment to go by default against the

(*a*) Doe d. Tubb v. Roe, 4 Taunt. 887. (*b*) *Ibid.*

Of staying proceedings.

casual ejector. Upon an application on the part of the mortgagor (accompanied by an affidavit of the facts) to stay the execution, until the determination of the appeal, upon the ground that the title of the lessor would be invalidated, provided the appeal were given in favour of the heir, and that the defendant might then perhaps be compelled to pay the mortgage money twice, the court made the following order "that the execution obtained by the lessor of the plaintiff in this action of ejectment, be staid until such time as the appeal now pending before the court of delegates be determined, upon the defendant's vesting the mortgage-money, interest, and costs, to be taxed by the master, in exchequer bills, and depositing such exchequer bills in the hands of the signer of the writs in this court." (*a*)

The court will not stay proceedings under this statute where the mortgagor has agreed to convey the equity of redemption to the mortgagee (*b*), though, in a case, where it appeared that the plaintiff had not tendered to the defendant a deed of conveyance to be executed, the court granted the motion. (*c*) Proceedings will be stayed under this act, on payment of the mortgage money, interest and costs, without paying off a bond debt due to the mortgagee, unless, as it seems, the application be made by the heir of the mortgagor. (*d*) And where there are two or more mortgages, the court of Common Pleas will not stay proceedings, on payment of the sum due upon one of the mortgages only. (*e*)

Of perpetual injunctions in equity.

When it was usual to try the title to land in real actions, a judgment in such action was a bar between the parties, and might be pleaded in another action of the same nature brought for the same lands (*f*); but as in ejectment the judgment is not conclusive, and does not operate as a bar between the parties (*g*), a court of equity, in order to quiet the possession and prevent perpetuity of suits, will decree a perpetual injunction, where several ejectments have been brought in succession. (*h*)

(*a*) Doe d. Mayhew v. Erlam, M. T. 1811. Adams Eject. 324, 2nd edit. The court did not in this case advert to the circumstance, that the mortgagor who made the application had not appeared to the action. *Ib.*

(*b*) Goodtitle d. Taysum v. Pope, 7 T. R. 185.

(*c*) Skinner v. Stacy, 1 Wils. 80.

(*d*) Archer v. Snatt, 2 Str. 1107. Andr. 341, S. C. Barnes, 177, 182.

(*e*) Roe d. Kaye d. Soley, 2 W. Bl. 726.

(*f*) *Ante*, p. 213.

(*g*) *Ante*, p. 601.

(*h*) Devonsher v. Newenham, 1 Sch. and Lef. 208.

Of perpetual injunctions in equity.

In the case of the earl of Bath v. Sherwin (*a*) where five ejectments had been brought, in each of which a verdict was found for the plaintiffs in equity, on a bill filed in the court of Chancery, Lord Cowper refused a perpetual injunction, but the House of Lords, on appeal, reversed his decree and granted the injunction. In Leighton v. Leighton (*b*), where several ejectments had been brought, some of which had been found for the defendant in equity, but two of which, upon trials at bar (*c*), had been found for the plaintiff in equity, Lord Parker, C. decreed a perpetual injunction, and this decree was affirmed in the House of Lords. So in Barefoot, v. Fry (*d*), the defendant in equity having brought five ejectments, and having been nonsuited in three of them, verdicts having been found for the plaintiff in equity in the others, a perpetual injunction was granted by the court of Exchequer. It seems that a court of equity will grant a perpetual injunction, although the ejectments have not been brought under the direction of the court. (*e*)

(*a*) 10 Mod. 1. Pr. Chan. 261. 2 Eq. Ab. 171, 243. 1 Br. P. C. 266. Vin. Ab. Injunction, (D,) pl. 6, S. C.

(*b*) 1 Str. 404. 1 P. Williams, 671. 2 Eq. Ca. Ab. 523. 2 Br. P. C. 217. Lords' Journals, vol. 21, fo. 455, S. C.

(*c*) See Coke v. Farewell, 2 P. Williams, 564.

(*d*) Bunbury, 158. And see Harwood v. Rolph, Selw. N. P. 720, 4th edit.

(*e*) See the cases cited above; and Bates v. Graves, 2 Ves. Jun. 293.

Replevin.

In modern practice, the action of replevin is appropriated to redressing the injury occasioned by a wrongful distress (*a*), though it appears, that where goods are tortiously taken, not as a distress, an action of replevin will lie, as well as an action of trespass. (*b*) To maintain this action there must have been an actual taking of the goods out of the possession of the party who sues it. (*c*)

By whom.

The plaintiff must have either an absolute, or a special property in the goods distrained (*d*), and several persons cannot join in the action, unless they are jointenants or tenants in common. (*e*) If the cattle of a feme-sole are taken, and she afterwards marries, her husband alone may bring replevin, or the two may join. (*f*) Executors may have replevin for a taking in the lifetime of their testator. (*g*)

Against whom.

Replevin lies against him who takes the goods, or against him who commands the taking, or against both together.

For what.

Replevin lies for the unlawful taking of any goods and chattels, whether they be live cattle or dead chattels (*h*), and for the young of cattle born after the distress taken (*i*), but it cannot be maintained for things affixed to the freehold, and which cannot be distrained. (*k*) Since the statute 2 W. and M. c. 5, s. 3, which authorises the landlord to distrain sheaves or cocks of corn, or loose corn or hay lying upon any part of the land

(*a*) Co. Litt. 145, b. Com. Dig. Replevin, (A). Bull. N. P. 53. 3 Bl. Com. 147.

(*b*) 2 Rol. Ab. 430, l. 41. Shannon v. Shannon, 1 Sch. and Lef. 224. Dore v. Wilkinson, 2 Stark. N. P. C. 288.

(*c*) Shannon v. Shannon, *ubi sup.*

(*d*) Co. Litt. 145, b. 2 Rol. Ab. 430, l. 23, 50. Bull. N. P. 53.

(*e*) Co. Litt. 145, b. Bull. N. P. 53.

(*f*) Bern v. Maittaire, cases temp. Hardw. 120. Bull. N. P. 53; and see Blackborn v. Greaves, 2 Lev. 107. Milner v. Milnes, 3 T. R. 627. But the interest of the wife must appear. Serres v. Dodd, 2 Bos. and Pul. N. R. 405.

(*g*) Arundell v. Trevill, 1 Sid. 82. Bull. N. P. 53.

(*h*) F. N. B. 68, D. Com. Dig. Replevin, (A).

(*i*) F. N. B. 69, D. Gilb. Repl. 170.

(*k*) Bac. Ab. Repl. (F). And see Neblet v. Smith, 4 T. R. 504.

For what.

charged with the rent, and the statute 11 Geo. 2, c. 19, s. 8, which authorises landlords to distrain corn, grass, or other product growing on any part of the land demised, replevin will lie in case of such distresses. Replevin does not lie for charters relating to the inheritance, which are not esteemed chattels in law (*a*), nor for goods taken in a foreign country, though afterwards brought into this realm, because such a caption might have been justifiable according to the law and custom of the place where it was made, though illegal by our law. (*b*) Goods distrained for rent may be replevied, after the expiration of five days, and removal and appraisement of the distress, but before the sale. (*c*)

A replevin does not lie for goods taken in execution (*d*), nor for goods distrained under a conviction for deer-stealing (*e*), nor upon a distress made for a duty to the crown (*f*), and in general, where a distress and sale are given by statute, they are in the nature of an execution, and replevin will not lie (*g*), unless the statute contemplates the bringing of a replevin (*h*), as where a distress is taken for poor's rates under the statute 43 Eliz. c. 2, by the nineteenth section of which statute, the party "making avowry or justification" is allowed to plead generally. (*i*) Where replevin was brought for goods seised under a warrant of distress for an assessment made by a special sessions, under the highway act 13 Geo. 3, c. 78, s. 47, the court of Common Pleas refused to set aside the proceedings (*k*); and where a similar application was made to set aside the proceedings in replevin, upon a distress

(*a*) Br. Ab. Repl. 34. Gilb. Repl. 170.

(*b*) Nightingale v. Adams, 1 Shower, 91. Gilb. Repl. 171.

(*c*) Jacob v. King, 5 Taunt. 451. 1 Marsh. 135, S. C.

(*d*) Com. Dig. Replevin, (D). Bull. N. P. 53; but according to Gilbert, replevin lies for goods taken in execution under the process of an inferior court. Gilb. Repl. 167.

(*e*) R. v. Monkhouse, 2 Str. 1184; and see Wilson v. Weller, 1 B. and B. 57.

(*f*) R. v. Oliver, Bunb. 14; and the court granted an attachment against the sheriff. *Ibid.*

(*g*) Bradshaw's case, Bac. Ab. Repl. (C). 1 Barnard. B. R. 110. Wilson v. Weller, 1 B. and B. 63. Willes, 672, note (b); but see Anon. T. Jones, 25. See also Hutchins v. Chambers, 1 Burr. 588.

(*h*) Fletcher v. Wilkins, 6 East, 287.

(*i*) See also the statute of sewers, 23 H. 8, c. 5, s. 11. Callis on sewers, 194. As to replevin for poor's rate, see Milward v. Caffin, 2 W. Bl. 1330. Hurrell v. Wink, 8 Taunt. 369. 2 B. Moore, 417, S. C. See the form of avowry, 2 Chitty's Pl. 516, 3rd edit. The plaintiff may plead in bar *de injuriâ* generally. Com. Dig. Pleader, (F. 18).

(*k*) Fenton v. Boyle, 2 Bos. and Pul. N. R. 392.

by authority of the commissioners of sewers, the court declined to interfere in this summary way, but left it to the defendant to put his objection on the record in a formal manner (*a*); nor will the court of King's Bench issue an attachment against the officer who grants a replevin of goods taken under a conviction before a magistrate on a penal statute, it being only a contempt of the inferior jurisdiction, in which case the court of King's Bench never interposes. (*b*) For what.

The mode of proceeding in this action at common law was by issuing an original writ directed to the sheriff, by which he was authorised to deliver the goods, and to determine the matter in the county court. (*c*) But this method of proceeding has been long obsolete (*d*), and the usual way of recovering the goods now is by levying a plaint in the county court, the sheriff being authorised by the statute of Marlbridge, c. 21, to deliver the goods, and to hold plea in replevin of any value, as he might at common law on a writ of replevin. (*e*) Process.

Upon application to the sheriff, or to one of his deputies, appointed by virtue of 1 and 2 P. and M. c. 12, s. 3 (*f*), the sheriff or his deputy will grant a precept to replevy the goods, and such precept may be granted in the interval between one county court and another (*g*), and the plaint may be entered at the next court.

In order that the defendant in replevin, if he had judgment for a return, might not be defrauded of the fruit of such judgment, the statute of West. 2, (13 Ed. 1, c. 2,) requires the sheriff, before he makes deliverance of the distress, not only to take from the plaintiff the usual pledges to prosecute, but also for a return of the beasts, if a return be awarded; and, if he take pledges otherwise, he shall answer for the price of the beasts, Replevin bonds. Stat. West. 2.

(*a*) Pritchard v. Stephens, 6 T. R. 522.

(*b*) R. v. Burchett, 1 Str. 567. 8 Mod. 209, S. C.

(*c*) 2 Inst. 140.

(*d*) Replevin by writ is still frequent in Ireland.

(*e*) 2 Inst. 140. Inferior courts, (not hundred courts,) may have a *prescriptive* right to hold plea of replevin by plaint. Wilson v. Hobday, 4 M. and S. 128. Bac. Ab. Replev. (C).

(*f*) See Griffiths v. Stephens, 1 Chitty's Rep. 196, where prohibition issued to the sheriff, on replevin granted by a person not appointed under this statute.

(*g*) 2 Inst. 139. Co. Litt. 145, b.

Replevin bonds. Stat. West. 2.

and he who distrains shall have his recovery by writ, that the sheriff shall render to him so many cattle or goods, and, if the bailiff have not wherewith he may render, his superior shall render.

Under this statute, the sheriff may take a bond either from the plaintiff himself (*a*), or from one or more pledges (*b*), conditioned to prosecute the suit with effect, and to make a return, if a return shall be adjudged; and it does not render the bond invalid, if a condition is added to save the sheriff harmless. (*c*)

Stat. 11 G. 2, c. 19.

In order to give the defendant in replevin, in cases of distresses for rent, a more complete remedy against vexatious suits, it is enacted by statute 11 Geo. 2, c. 19, s. 23, that all sheriffs and other officers, having authority to grant replevins, may and shall, in every replevin of a distress for *rent* (*d*), take in their own names from the plaintiff, and two responsible persons as sureties, a bond in double the value of the goods distrained, (such value to be ascertained by the oath of one or more credible witness or witnesses (*e*), not interested in the goods or distress, which oath the person granting such replevin is thereby authorised and required to administer), and conditioned for prosecuting the suit with effect and without delay; and for duly returning the goods and chattels distrained, in case a return shall be awarded, before any deliverance be made of the distress; and that such sheriff or other officer as aforesaid, taking any such bond, shall, at the request and costs of the avowant, or person making conusance, assign such bond to the avowant or person aforesaid, by indorsing the same, and attesting it under his hand and seal, in the presence of two or more credible witnesses, which may be done without any stamp, provided the assignment so indorsed be duly stamped before any action brought thereupon; and, if the bond so taken and assigned be forfeited, the avowant, or person making conusance, may bring an action and recover thereupon in his own name, and the court, where such action shall be brought, may, by a rule of the same court, give such relief to the parties upon such bond as may be agreeable to

(*a*) Blackett v. Crissop, 1 Ld. Raym. 278.

(*b*) Moyser v. Gray, Cro. Car. 446. Gilb. Repl. 79. He must not take money in lieu of pledges. *Ibid.*

(*c*) Blackett v. Crissop, 1 Ld. Raym. 278. Short v. Hubbard, 2 Bingh. 357.

(*d*) A rent-charge is within the statute. Short v. Hubbard, 2 Bingh. 349.

(*e*) See Middleton v. Bryan, 3 M. and S. 157.

justice and reason, and such rule shall have the nature and effect of a defeasance to such bond.

Replevin bond.

Stat. 11 G. 2, c. 19.

The sheriff, under this statute, takes a bond, either from the plaintiff and two responsible persons, or from the latter alone; and where the bond had been executed by one of the sureties only, it was held that the sheriff was entitled to sue upon such bond. (*a*) The bond must, by the statute, be in double the value of the goods distrained, and conditioned for prosecuting the suit with effect and without delay, and for duly returning the goods and chattels distrained, in case a return shall be awarded; and a bond conditioned for appearance at the next county court; prosecuting the plaint with effect; making a return, if adjudged, *and indemnifying the sheriff from all charges and damages by reason of the replevin*, is authorised by the statute. (*b*) If a surety in the replevin bond is a material witness in the cause, the court will grant a rule for substituting another surety in his place, upon giving the defendant's attorney notice of such rule. (*c*)

Duty of the sheriff in making deliverance.

The plaintiff having found the requisite sureties, it is the duty of the sheriff to issue his precept to replevy the goods taken, and to summon the defendant to appear at the next county court. If the cattle were taken within a liberty, and impounded there, the sheriff must, in the first instance, issue his warrant to the bailiff of the liberty, having return of writs, to make deliverance, and, if the bailiff makes no answer, then the sheriff may, by the statute of Marlbridge, c. 21, himself deliver the goods without a *non-omittas* (*d*), and, if the distress was taken out of the liberty, but impounded within it, the sheriff may enter the liberty, to make deliverance, without any previous warrant to the bailiff. (*e*) By the statute of Westm. 1, c. 17, the sheriff, after demand made, may break open the house of the person who has made the distress, in order to deliver the cattle or goods distrained. (*f*) If the goods cannot be taken on the first precept, the sheriff issues another precept, in the nature of an alias writ

(*a*) Austen v. Haward, 7 Taunt. 28. 2 Marsh. 352, S. C. *Quære* whether such bond be assignable under stat. 11 G. 2, c. 19.

(*b*) Short v. Hubbard, 2 Bingh. 349. Perhaps a question may arise, whether an assignee can sue on the indemnity clause. *Per* Gaselee, J. *Ibid.* 360.

(*c*) Bailey v. Bailey, 1 Bingh. 92.

(*d*) 2 Inst. 139, 140, F. N. B. 68; F.

(*e*) *Ibid.* Gilb. Repl. 81.

(*f*) 2 Inst. 193. This seems to be in confirmation of the common law. Gilb. Repl. 81.

Duty of the sheriff in making deliverance.

of replevin, after which a *pluries* may issue, and, if the cattle, on an inquest of office held by the sheriff, are found to be eloigned, a precept issues in the nature of a writ of *withernam* to take other cattle in lieu of those eloigned. (*a*) The goods or cattle taken in *withernam* cannot be replevied until the original distress is forthcoming. (*b*) If the cattle are withheld, the plaintiff may still proceed in the cause, and recover damages to the full value of the cattle, as well as for the detention. (*c*)

Writ *de proprietate probandâ.*

If the defendant claims property in the goods, the sheriff cannot proceed to replevy them, for he is not authorised to determine questions of property in his court without the king's writ. (*d*) The plaintiff, therefore, in this case, may sue out a writ *de proprietate probandâ*, when the replevin is by plaint, upon which the sheriff holds an inquest of office, to inquire in whom the property resides; if it is found in the plaintiff, the sheriff is to make deliverance; if in the defendant, he can proceed no further. (*e*) If the inquest find against the plaintiff, the latter may still have a new replevin *by writ*, and, if to this writ the sheriff returns the claim of property, the cause shall, notwithstanding, proceed in the court above, where the property shall be put in issue and finally tried. (*f*) The claim of property must be made by the defendant in person, and not by his servant or bailiff (*g*), but a bailiff, though he cannot *claim* property before the sheriff, may, in the court above, *plead* property in a stranger, for that is a sufficient reason to excuse him from damages, since it shews that he has not taken the plaintiff's goods. (*h*)

The writ *de proprietate probandâ* is an inquest of office, and the sheriff must give notice to the parties of the time and place of executing it. (*i*)

Proceedings in the county court.

The first proceeding in the county court is the plaint, which ought regularly to be levied before the goods are replevied (*k*), but which may be entered at the court next after the granting of

(*a*) Gilb. Repl. 98, 108, F. N. B. 74, B. Tidd's Pr. Forms, 668, 5th edit. In replevin by writ, the *withernam* issues on the sheriff's return of *elongata*. Gilb. Repl. 98.

(*b*) 3 Bl. Com. 149.

(*c*) Wilk. Repl. 20.

(*d*) Co. Litt, 145, b. If the sheriff proceeds after claim made, he is a trespasser. Leonard v Stacy, 6 Mod. 140.

(*e*) Co. Litt. 145, b.

(*f*) *Ibid.* Vin. Ab. Repl. (F. 2,) pl. 1.

(*g*) Co. Litt. 145, b.

(*h*) Gilb. Repl. 134. Oldham v. Hamsted, 1 Lev. 90.

(*i*) Dalt. Sher. 274.

(*k*) Seal v. Phillips, 3 Price, 18.

the precept to replevy. (*a*) The court of King's Bench will not, on motion, whatever they might do by *mandamus*, compel the sheriff to enter the plaint. (*b*) The precept to replevy contains a summons for the defendant to appear at the next county court, and, if he neglects to do so, he cannot, as it seems, take an assignment of the replevin bond, and sue the sureties for the plaintiff's not prosecuting with effect. (*c*)

Proceedings in the county court.

As the cause cannot proceed in the county court, when the defendant claims property (*d*), or the freehold comes in question (*e*), and, as the statute which gives the writ of second deliverance only extends to the superior courts (*f*), and consequently, the defendant below is subject, in case of the plaintiff being nonsuited, to a new replevin, it is the usual practice to remove the cause in the first instance into one of the superior courts.

Of removal into superior court.

Where the replevin has been sued by original writ, the plaintiff or defendant may remove the cause out of the county court into the King's Bench or Common Pleas, by writ of *pone*. (*g*)

By *pone*.

If the replevin was commenced in the county court by *plaint*, the mode of removing it is by a writ of *recordari facias loquelam*, which is a writ out of Chancery, whereby the sheriff is commanded that, in his full county, he cause to be recorded the plaint which is in the same county, without the king's writ, and that he have that record in the court above, on a general return day, under his seal, and the seals of four lawful knights of his county, who were present at the recording, and that he prefix the same day to the parties, that they be then there to proceed in the action. (*h*) Although the suit has been discontinued in the county court, the plaint may yet be removed by *recordari*. (*i*)

By *recordari facias loquelam*.

Where the replevin has been sued by plaint in the court of a lord, it may be removed by a writ similar to the last, but commanding the sheriff, that taking with him four discreet and law-

By *accedas ad curiam*.

(*a*) 2 Inst. 139. Co. Litt. 145, b.

(*b*) *Ex parte* Boyle, 2 Dowl. and Ryl. 13.

(*c*) Seal v. Phillips, 3 Price, 7.

(*d*) *Ante*, p. 626.

(*e*) Bac. Ab. Repl. (O).

(*f*) 2 Inst. 340. Gilb. Repl. 255.

(*g*) F. N. B. 69, M. Tidd's Pr. 415, 8th edit.

(*h*) Com. Dig. Pleader, (3 K. 8). Tidd's Pr. 415, 8th edit. Wilk. Repl. 27. The plaint is well removed by *certiorari* where it ought to have been by *recordari*, F. N. B. 69 M. (a). Tidd, 417. So where there is a variance between the writ and plaint. *Ibid.* But see Moor, 30.

(*i*) F. N. B. 71 A. Gilb. Repl. 150.

Of removal into superior court.

ful knights of his county, he go in his proper person to the court of the lord, and in that full court cause to be recorded the plaint, &c. The four persons mentioned in this writ need not in fact be knights. (*a*)

By *certiorari*.

Where the replevin has been brought in a court of *record*, which may hold plea in replevin, it may be removed by *certiorari*. (*b*)

When cause shewn.

The plaintiff may remove the cause either by *pone* or *recordari*, without cause shewn, for it is in his own delay; but the defendant cannot remove it without cause shewn, and the cause usually assigned is, that the sheriff or his clerk is related to one of the parties, to which the sheriff cannot return that the cause is not true. (*c*) But neither the plaintiff nor defendant can remove a cause out of the lord's court, without cause shewn, for they cannot oust the lord of the profits of his jurisdiction without apparent reason. (*d*) Anciently the cause alleged was examined before granting the writ, but it is now usual to issue it as a matter of course, without such examination. (*e*)

Duty of the sheriff or lord on receipt of the writ.

The writ of *pone*, *recordari*, or *accedas ad curiam* when delivered to the sheriff or lord, instantly suspends his power, so that if he afterwards proceeds, he is liable to an attachment (*f*), and he cannot refuse obedience to the writ, because his fees are not paid. (*g*) The return to the *pone* or *recordari* should be made and filed by the party suing it out, with the filacer of the court above, in two terms after it is returnable, or upon the filacer's certificate the cursitor will issue a *procedendo*. (*h*) The *recordari* or *accedas ad curiam* should be returned under the sheriff's seal, and the seals of four suitors of his court; and it is a good return for the sheriff to say, that after the receipt of the writ, and before the return, no court was held; and also, that he required the lord to hold his court, and he would not, so that he could not execute the same, upon which a *distringas* shall issue to distrain the lord to hold his court. (*i*)

Proceedings after removal.

Where the writ of removal is prosecuted by the *plaintiff*, and

(*a*) F. N. B. 18 E. Tidd's Pr. 416.

(*b*) Dorrington v. Edwin, 3 Mod. 56. Com. Dig Pleader, (3 K. 7). Wilk. Repl. 33.

(*c*) F. N. B. 70 A. B. Gilb. Repl. 137. 2 Inst. 339. Tidd's Pr. 416, 8th edit.

(*d*) 2 Inst. 339.

(*e*) Tidd's Pr. 416, 8th edit. Gilb. Repl. 141.

(*f*) Tidd's Pr. 416, 8th edit. Bevan v. Prothesk, 2 Burr. 1151.

(*g*) 2 Burr. 1152.

(*h*) Tidd's Pr. 416, 8th edit.

(*i*) F. N. B. 18 E. Tidd's Pr. 417, 8th edit.

the defendant does not appear on or before the appearance day of the return, the plaintiff having filed the writ and return with the filacer, should give a rule with that officer for the defendant to appear (*a*), which expires in four days (*b*); and upon his non-appearance, a *pone per vadios* is issued, upon which a summons is made out and served upon the defendant, and if he still neglects to appear, the plaintiff, upon the return of *nihil*, may have a *distringas*, and afterwards, if necessary, an *alias* and *pluries distringas*, upon which issues may be levied from time to time, until the defendant appears, when he must pay the costs of the different writs. (*c*) If *nulla bona* is returned, the plaintiff may have a *capias* and process of outlawry. (*d*) If the *defendant* has removed the cause by *pone*, or as it seems by *recordari*, and the plaintiff appears, but the defendant makes default, a *distringas* issues, and on *nulla bona* returned, a *capias*. (*e*) The appearance of the defendant is entered with the filacer in the King's Bench, and with the prothonotary in the Common Pleas; after which the next step for the plaintiff is to declare. (*f*)

Of removal into superior court.

Where the writ of *pone* or *recordari* is brought by the defendant, he should file the writ and return with the filacer, and enter an appearance. (*g*)

If the party suing out a *recordari*, &c. does not get it returned and filed within *two* terms, the other party should apply to the filacer for a certificate that the same is not returned and filed; which will be a sufficient warrant for the cursitor to make out a writ of *procedendo*, for remanding the cause to the inferior court; or if either party, having sued out a *recordari*, &c. neglects to file it, the other party, for the sake of expedition, may, without waiting till the end of the second term, sue out another writ of the same nature, and get it returned and filed, for removing the proceedings into the court above. (*h*)

Of the declaration.

Where the cause has been removed by the defendant, and an appearance been entered by him, he may give a rule for the plaintiff to declare, with the master in the King's Bench, or

(*a*) Tidd's Pr. 418, 8th edit. Wilk. Repl. 31.

(*b*) Thompson v. Jordan, 2 Bos. and Pul. 138.

(*c*) Tidd's Pr. 418, 8th edit. Wilk. Repl. 31.

(*d*) *Ibid.* Gilb. Repl. 142.

(*e*) Gilb. Repl. 142. Tidd's Pr. 418.

(*f*) Tidd's Pr. 418, 8th edit. Wilk. Repl. 33.

(*g*) Tidd's Pr. 418, 8th edit.

(*h*) *Ib.* 419.

Of the declaration.

filacer in the Common Pleas (*a*), and if the return to the *recordari* is filed on or before the appearance day, there is no occasion to demand a declaration in writing (*b*), but otherwise a written demand is necessary. (*c*) The rule to declare may be given in the King's Bench within *fourteen* days (*d*), or in the Common Pleas within *four* days (*e*), after the end of the term, and served on any day before the time in the rule has expired; and the plaintiff in the King's Bench must declare within four days after such service. (*f*) The same mode of proceeding may be adopted to compel the plaintiff to declare, where he neglects to do so, after having himself sued out and filed the writ of *recordari*, and if he does not declare within the time limited by the rule, or obtain a rule for time to declare, the defendant may sign a judgment of *non pros*, and may have a writ of *retorno habendo*, or if the distress was for rent, may proceed to execute a writ of inquiry on the statute 17 Car. 2, c. 7. (*g*)

Though the plaintiff has already declared in the county court, yet as nothing is removed but the plaint, he must declare *de novo* in the court above (*h*), and though the plea has been discontinued in the county court, yet the plaint may still be removed, and the plaintiff shall declare upon such plaint in the court above. (*i*)]

How entitled.

Where the cause has been removed into a superior court, the declaration may be entitled of the term of the return of the *recordari* (*k*), or as it seems of that in which it is delivered; but if it is entitled of an intermediate term, it is irregular. (*l*)

Venue.

The venue may be laid either in the county where the cattle or goods were taken, or in a county into which they have been driven after the taking (*m*), for the wrong is continued in every place where the defendant has them in his custody. (*n*)

Place.

The *locus in quo*, or place in which the defendant took the cattle, &c. or had them in his custody, must be stated, as well as

(*a*) Tidd's Pr. 418, 8th edit.
(*b*) *Ibid.* James v. Moody, 1 H. Bl. 281.
(*c*) Tidd, *ubi sup.*
(*d*) *Id.* 419. Edwards v. Dunch, 11 East, 183.
(*e*) Tidd, *ubi sup.*
(*f*) *Ibid.* 11 East, 183.
(*g*) Tidd, *ubi sup.* Wilk. Repl. 38.
(*h*) F. N. B. 71, A. Tidd's Pr. 418, 8th edit.
(*i*) F. N. B. 71 A. Tidd's Pr. 417.
(*k*) Smith v. Muller, 3 T. R. 624. Wilk. Repl. 40.
(*l*) Topping v. Fuge, 5 Taunt. 774. Wilk. Repl. 40.
(*m*) Com. Dig. Pleader, (3 K. 10). F. N. B. 69 I. Abercrombie v. Parkhurst, 2 B. and P. 481.
(*n*) *Per* Wilmot, C. J. Walton v. Kersop, 2 Wils. 335.

Of the declaration.

the parish, or vill, and if it be omitted, the defendant may demur, but the omission is cured by pleading over, or after verdict. (*a*) The place and vill are both traversable. (*b*) If the cattle are stated to have been taken in A. and B. it should appear how many were taken in the one, and how many in the other. (*c*)

The cattle or goods must be stated to be the property of the plaintiff (*d*), and must be described with sufficient certainty, and therefore where the plaintiff declared for taking "divers goods and chattels," and the defendant suffered judgment by default, final judgment was arrested (*e*); but where the goods were described as "fourteen skimmers and ladles, and three pots and covers," without showing how many of each; on motion after verdict to arrest the judgment, the description was held sufficient. (*f*) The particular kind of cattle ought to be mentioned (*g*), but it is not usual to insert the value of the cattle or goods taken. (*h*)

Of the plea.

The defendant in replevin may either plead a justification, or avow, or make cognisance. The distinction between a justification, and an avowry or cognisance, is, that the justification confesses the taking of the cattle, &c. but avoids the illegality of such taking, without seeking for a return, the object of the plea being solely to exclude the plaintiff from damages; but the avowry or cognisance not only justifies the taking, but claims a return of the cattle, &c. (*i*) The rule is, that when the defendant ought to have the thing for which he took the distress, he must avow, but that where, by matter arising since the distress, he is not entitled to have the thing which he distrained for, and is conse-

(*a*) Read v. Hawke, Hob. 16. 1 Brownl. 176, S. C. Ward v. Lavile, Cro. Eliz. 896. Moore, 678, S. C. Com. Dig. Pleader, (3 K. 10). 1 Saund. 347, notes, 5th edit. Bull. N. P. 53.

(*b*) Weston v. Carter, 1 Sid. 10. Read v. Hawke, Hob. 16.

(*c*) Litt. Rep. 37. Com. Dig. Pleader, (3 K. 10).

(*d*) Franklyn v. Reeves, cases *temp.* Hardw. 118. 2 Str. 1023, S. C.

(*e*) Pope v. Tillman, 7 Taunt. 642. 1 B. Moore, 386, S. C. It is more necessary in replevin than in trespass or trover, that the goods should appear. *Per* Gibbs, C. J. *Ibid.*

(*f*) Bern v. Mattaire, Ca. *temp.* Hardw. 119. 2 Saund. 74, b. notes, 5th edit.

(*g*) *Per* Ellis, J. Whateley v. Conquest, Cart. 218. Com. Dig. Pleader, (3 K. 10).

(*h*) 2 Saund. 320, notes, 5th edit. That is, in replevin in the *detinuit*, which is now the usual form of action. If brought in the *detinet*, the value should be stated, for the plaintiff will be entitled to recover it.

(*i*) Gilb. Repl. 183. Anon. T. Jones, 25. Aylesbury v. Harvey, 3 Lev. 204.

Of the plea.

quently not entitled to judgment for a return, he must then justify and not avow. (*a*)

Property in the defendant, or a stranger.

Though in general, as above stated, a plea merely in justification does not entitle the defendant to a return, yet the plea of property in the defendant himself, or in a stranger, is an exception to this rule. Such a plea disaffirms the plaintiff's right to retain the property, and if found for the defendant, entitles him to a return without an avowry, even where property in a stranger is pleaded, because the defendant is entitled to the possession of the property against every one but the true owner. (*b*)

But where the justification affirms property in the plaintiff, and merely excuses the defendant from damages, the latter cannot have a return, as if a lord distrains for homage, and the tenant dies, and his executor sues replevin; in this case the defendant may justify the taking, and excuse himself from damages, because the distress was rightly taken at first, though in consequence of the death of his tenant, he can no longer detain the distress as a pledge, and cannot therefore be entitled to a return. (*c*)

Non cepit.

The plea of *non cepit*, that the defendant did not take the cattle, &c. as the plaintiff has complained against him, is usually called the general issue in replevin. It only puts in issue the taking of the goods, and if found for the defendant, excuses him from damages, but does not entitle him to a return. If he wants a return he must plead *cepit in alio loco*, that he took the cattle in some other place (describing it), and traverse the place laid in the declaration, and in order to have a return, he must avow or make cognisance, stating the cause for which he distrained. (*d*)

Cepit in alio loco.

Where the defendant neither took the goods in the place mentioned in the declaration, nor had them in such place while in his custody, he may plead *cepit in alio loco*, and entitle himself to a return by adding an avowry, or cognisance, which in this

(*a*) Doctr. Pl. 316. Bull. N. P. 54.

(*b*) Pregrove v. Saunders, 6 Mod. 81. 1 Salk. 5, S. C. Wildman v. North, 2 Lev. 92. 1 Vent. 249, S. C. Gilb. Repl. 184. It was formerly held, that these pleas might be pleaded in abatement. Com. Dig. Pleader, (3 K. 11). Gilb. Repl. 184.

(*c*) Doct. Plac. 316. Gilb. Repl. 186.

(*d*) Johnson v. Wollyer, 1 Str. 507. Anon. 2 Mod. 199. 1 Saund. 347, notes, 5th edit. Com. Dig. Pleader, (3 K. 11). Gilb. Repl. 181.

case is not traversable. (*a*) But if the defendant had the cattle in his custody, in the place mentioned in the declaration, but took them in another place, where he was in fact justified in taking them, he must not plead *cepit in alio loco* generally, which in such case would be found against him (*b*), but must plead specially, that he took the cattle, &c. in such a place, setting out a right to take them there, and admitting that he had them in his custody in the place stated in the declaration. (*c*) The plea of *cepit in alio loco* is properly a plea in bar. (*d*) Of the plea.

The defendant in replevin may plead the statute of limitations, 21 Jac. 1, c. 16, s. 3, by which replevin for taking cattle and goods shall be commenced and sued within six years next after the cause of such action or suit, and not after. The defendant should say *actio non accrevit infra sex annos*, for where he pleaded *not guilty of the taking within six years*, the plea was held bad, as giving no answer to the unjust detention. (*e*) Statute of limitations.

The defendant in replevin is allowed by certain statutes to plead not guilty, or generally that the act complained of was done under the authority of the statute. (*f*) Where the defendant seeks a return of the goods, he must avow, or make cognisance. Justifications under authority of certain statutes.

The person who avows or makes cognisance being entitled, if he succeeds, to have a return of the goods, is in the nature of a plaintiff, and therefore, in general, the avowry or cognisance, which is in the place of a declaration, must shew a good title *in omnibus*, and contain sufficient matter to entitle the party to a return. (*g*) It must give an answer to every material part of the declaration; thus where the plaintiff alleges a taking in two places, and the defendant avows as to one only, it is bad on demurrer. (*h*) An avowant is considered to be within the statute Of the avowry and cognisance.

(*a*) Anon. 1 Ventr. 127. Foot's case, 1 Salk. 93. Bullythorpe v. Turner, Willes, 475. Bull. N. P. 54.

(*b*) Walton v. Kersop, 2 Wils. 354. Mattravers v. Fosset, 3 Wils. 295.

(*c*) Abercrombie v. Parkhurst, 2 B. and P. 480. Bull. N. P. 54.

(*d*) Bullythorpe v. Turner, Willes, 475.

(*e*) Arundal v. Trevill, 1 Sid. 81. 1 Keb. 279, S. C. Gilb. Repl. 182.

(*f*) 43 Eliz. c. 2, s. 19, as to poors' rates; 23 H. 8, c. 5, s. 11, as to sewers' rates; but see *ante*, p. 622, as to replevin lying where goods are taken under a distress given by act of parliament. See also Anon. T. Jones, 25.

(*g*) Goodman v. Ayling, 1 Browni. 213. Yelv. 148. Anon. 2 Mod. 199. 1 Saund. 347, b. notes, 5th edit.

(*h*) Weeks v. Speed, 1 Salk. 94.

Of the avowry and cognisance.

4 Anne, c. 16, s. 4, and may plead several pleas. An avowry being in the nature of a declaration need not be averred. (*a*)

Where the defendant justifies, and seeks a return in right of another person, he must make cognisance, and not avow, the plea running, that "as bailiff of A. B. he well acknowledges" the taking (*b*), but if he says that "he well avows," instead of "well acknowledges," it is only matter of form. (*c*) It is sufficient for the defendant in his cognisance to say generally "as bailiff of A. B." without shewing his authority; and a subsequent agreement of A. B. to the distress is equivalent to a previous command. (*d*) The fact of the defendant being bailiff is in all cases traversable (*e*); but one jointenant or coparcener has an authority in law, without any express command, to distrain as bailiff of his cotenant. (*f*)

Who may join.

Tenants in common must avow for their separate portions, and cannot join in an avowry for rent, because it is a demand in the realty (*g*); but in an avowry for damage feasant, which only concerns the personalty, tenants in common must join. (*h*) Parceners (*i*) and jointenants (*k*) must join in avowry; and if one jointenant or parcener distrains alone, and the replevin is brought against him only, he must avow in his own right, and make cognisance as bailiff to his cotenant, for the entire rent, and not for a moiety only in his own right. (*l*)

An avowry for rent arrear *jure uxoris* may be by husband and wife, or by the husband alone. (*m*)

For rent arrear.

As it is necessary, in an avowry, to state a good title *in omnibus*, it was formerly requisite, in an avowry for rent, to shew

(*a*) Co. Litt. 303, a. 1 Saund. 347, e. notes, 5th edit.

(*b*) Gilb. Repl. 206.

(*c*) Weadon v. Sugg, Cro. Jac. 373.

(*d*) Br. Ab. Trav. 3. 1 Saund. 347, c. notes, 5th edit.

(*e*) Trevillian v. Pine, 11 Mod. 112. See the cases collected 1 Saund. 347, d. notes, 5th edit. The declarations of a person, under whom the defendant makes cognisance, are not evidence for the plaintiff. Hart v. Horn, 2 Campb. N. P. C. 92.

(*f*) Leigh v. Shepherd, 2 B. and B. 465. 5 B. Moore, 297.

(*g*) Litt. s. 314, 317. Harrison v. Barnby, 5 T.R. 249. Gilb. Repl. 211.

(*h*) Anon. Sir W. Jones, 253. Colley v. Spearman, 2 H. Bl. 386.

(*i*) Stedman v. Bates, 1 Ld. Raym. 64. 1 Salk. 390, S. C.

(*k*) Pullen v. Palmer, Carth. 328. Gilb. Repl. 209.

(*l*) Page v. Stedman, Carth. 364. 1 Salk. 390. Pullen v. Palmer, Carth. 329. Gilb. Repl. 209. Leigh v. Shepherd, 2 B. and B. 465. 5 B. Moore, 297, S. C.

(*m*) Wise v. Bellent, Cro. Jac. 449. Osborne v. Walleeden, 1 Mod. 273. Gravenor v. Woodhouse, 2 Bingh. 73.

Of the avowry and cognisance.

For rent arrear.

that the defendant, or the person from whom he claimed, was seised, the quantity of estate of which he was seised, and that he made a lease to the plaintiff for life or years, or at will, and afterwards, if the defendant was assignee of the reversion, to shew the grant or descent of the reversion to him. (*a*) So where a termor, who had made an under-lease, avowed for the rent, it was necessary for him to state a seisin in fee, and to shew the creation of the term, and the conveyance of it to himself. (*b*) To obviate the difficulties imposed upon avowants by this strictness of pleading, it is enacted by statute 11 Geo. 2, c. 19, s. 22 (*c*), that it shall be lawful for all defendants in replevin, to avow or make cognisance generally, that the plaintiff in replevin, or other tenant of the lands and tenements whereon such distress was made, enjoyed the same under a grant or demise at such a certain rent, during the time wherein the rent distrained for incurred, which rent was then and still remains due, or that the place where the distress was taken, was parcel of such certain tenements held of such honor, lordship, or manor, for which tenements the rent, relief, heriot, or other service distrained for, was at the time of such distress and still remains due, without further setting out the grant, tenure, demise, or title of such landlord or lessor, owner or owners of such manor; and if the plaintiff shall become nonsuit, discontinue or have judgment against him, the defendant shall recover double costs. Notwithstanding this statute, it may still sometimes be proper to insert an avowry at common law, as where the parties agree to distrain, in order to try the title to an estate in an action of replevin; in which case it may perhaps be advisable for the avowant to set forth his title specially, in order to give the plaintiff an opportunity of traversing some particular part of it. (*d*)

Avowries and cognisances for distresses damage feasant, are not within this statute (*e*), nor avowries for rent charges. (*f*)

The defendant need not state, in his avowry, the exact amount

(*a*) Thomps. Ent. 264. 2 Saund. 284, d. notes, 5th edit.

(*b*) Scilly v. Dally, 2 Salk. 562. 1 Ld. Raym. 531, S. C. 2 Saund. *ubi sup.*

(*c*) By a former statute, 21 H. 8, c. 19, s. 2, the lord was enabled to avow, without naming any certain person or tenant, which, at common law, was necessary. See Co. Litt. 268, b. Com. Dig. Pleader, (3 K. 15). Gilb. Repl. 188.

(*d*) 2 Saund. 284, d. notes, 5th edit.

(*e*) 2 Saund. 284, d. notes, 5th edit.

(*f*) Bulpit v. Clarke, 1 B. and P. N. R. 56.

Of the avowry and cognisance.

For rent arrear.

of rent due, but may recover less than he has stated (*a*); though the terms of the tenancy, as to the reservation of the rent, &c. being matters of description, must be accurately stated. (*b*) It is not necessary to aver in the avowry, that the rent is still due and unpaid. (*c*)

Where part of the rent has been satisfied, the defendant may either avow for the entire rent (*d*), or for the part which remains due, but in the latter case the avowry must shew that the residue has been satisfied. (*e*)

There are several cases in which a distress is given by particular statutes, where it did not exist at common law, and in these cases it is in general necessary to avow specially, so as to bring the defendant within those statutes.

Thus where cattle fraudulently or clandestinely conveyed away, to prevent the landlord from distraining, have been followed and distrained under statute 11 Geo. 2, c. 19, s. 1, 2, and the tenant brings replevin, the defendant must avow specially under the statute. (*f*)

So where the landlord distrains within six months after the expiration of the tenancy, by virtue of the statute 8 Anne, c. 14, s. 6, 7, and the tenant replevies, the landlord must, in his avowry, shew specially that he took the distress by virtue of the statute. (*g*)

But it is not necessary, in an avowry, under the statute 32 Hen. 8, c. 37, which enables the executors of tenants in fee simple, fee tail, and for life, of rent, services, &c. to distrain for the arrears, to state for what term the tenant held the premises, or the title of the landlord. (*h*)

For damage feasant.

An avowry or cognisance for a distress damage feasant, not being within the statute 11 Geo. 2, c. 19, the defendant must set forth his title in such avowry or cognisance. It is however sufficient for him, provided he is the owner of the freehold, to state

(*a*) Forty v. Imber, 6 East, 434. Harrison v. Barnby, 5 T. R. 248. See Hurrell v. Wink. 2 B. Moore, 417, 8 Taunt. 370, S. C.

(*b*) Cossey v. Diggons, 2 B. and A. 549. Brown v. Sayce, 4 Taunt. 320.

(*c*) Clarke v. Davies, 7 Taunt. 72. 2 Marsh. 386, S. C. Gilb. Repl. 206.

(*d*) Cobb v. Bryan, 3 Bos. and Pul. 348.

(*e*) Holt v. Sambach, Cro. Car. 103. Hunt v. Braines, 4 Mod. 402. 1 Saund. 201, a. notes, 5th edit.

(*f*) 2 Saund. 284, a. notes, 5th edit.

(*g*) 2 Saund. 284, c. notes, 5th edit.

(*h*) Meriton v. Gilbee, 8 Taunt. 159. 2 B. Moore, 48, S. C. Martin v. Burton, 1 B. & B. 279, 3 B. Moore, 608. S. C. Lingham v. Warren, 4 B. Moore, 412. Staniford v. Sinclair, 2 Bingh. 193.

Of the avowry and cognisance.

generally, that the *locus in quo* was his soil and freehold, or if he makes cognisance, that it was the soil and freehold of A. B. without shewing the title more particularly (*a*); a form of pleading, which, although now firmly established, appears to be at variance with the rule, that if a party claims only a particular estate, the commencement of such estate ought to be shewn. (*b*) If the defendant merely states that he was *seised*, it is bad on special demurrer for uncertainty. (*c*) So where the defendant pleaded by way of justification, not seeking a return, that he was *possessed* of a messuage with the appurtenances, and, being so possessed, was *lawfully entitled* to common of pasture in the *locus in quo*, and distrained as a commoner the cattle damage feasant, and concluded with praying judgment *si actio, &c.*, the court of Common Pleas were of opinion, that the plea could not be supported. (*d*) If the avowant is tenant for years, he must set forth a seisin in fee, and shew the creation of the term and its conveyance to himself. (*e*) If the defendant avows in right of his wife, he must state his title accordingly. (*f*)

For damage feasant.

By force of a warrant, &c.

The defendant may make avowry under the authority of certain statutes. (*g*) Thus by statute 23 Hen. 8, c. 5, he may avow generally, that he took the goods by the authority of the commissioners of sewers for an assessment. (*h*) So by virtue of a warrant to distrain for the poor's rate, pursuant to statute 43 Eliz. c. 2, s. 19. (*i*) This general form of pleading is expressly given by the statutes.

For an amercement or customary demand.

So the defendant may avow for an amercement, as for not appearing at a leet (*k*), and the defendant ought to aver, that the plaintiff committed the offence for which he was amerced, which, in a justification in trespass, he is not compelled to do, for in replevin he is an actor. (*l*)

(*a*) Com. Dig. Pleader, (3 K. 21). 1 Saund. 347, d. notes, 5th edit. Gilb. Repl. 201.

(*b*) Scilly v. Dally, 1 Ld. Raym. 333.

(*c*) *Ibid.* Saunders v. Hussey, Carth. 9. 2 Lutw. 1231, S. C.

(*d*) Hawkins v. Eckles, 2 Bos. and Pul. 359. 2 Saund. 284, e. notes, 5th edit.

(*e*) 1 Saund. 346, e. notes, 5th edit. Gilb. Repl. 200.

(*f*) Bonner v. Walker, Cro. Eliz. 524.

(*g*) *Ante*, p. 633.

(*h*) Co. Litt. 283, a. Com. Dig. Pleader, (3 K. 26).

(*i*) *Ante*, p. 622. Com. Dig. *ubi sup.*

(*k*) Luke and Eve's case, 3 Leon. 14. Com. Dig. Pleader, (3 K. 27).

(*l*) Matthews v. Carey, 1 Salk. 107. Carth. 74, S. C. Stephens v. Haughton, 2 Str. 847.

Of the plea in bar.

So also the defendant may avow for a customary demand, as for a fine due by custom upon an alienation. (*a*)

To avowry for rent arrear.

To an avowry for rent the plaintiff may plead in bar *non dimisit*, that the avowant did not demise, as he has stated in his avowry. (*b*)

Non tenuit.

So he may plead *non tenuit modo et formâ*. Upon issue joined on this plea, the avowant must prove the terms of the tenancy, as stated (*c*) in his avowry, though he need not shew that the exact amount of rent claimed is due. (*d*) Where, upon a plea of *non tenuit* to an avowry for rent arrear, the defendant gives evidence of payment of rent, which is *primâ facie* proof of the demise, the plaintiff, not having come in under the defendant, may shew that such rent was paid under a mistake. (*e*) So under the plea of *non tenuit*, the plaintiff may shew that the defendant's title had expired at the time of the supposed rent becoming due. (*f*) So if it appears that the plaintiff occupied the land under an agreement for a lease, and not under a lease, the avowry will be disproved. (*g*)

Nil habuit in tenementis.

The plea of *nil habuit in tenementis* is a bad plea to an avowry for rent arrear (*h*), nor can any matter be pleaded, which amounts in effect to this plea (*i*), or be given in evidence under *non dimisit* or *non tenuit*, even though the title of the landlord is founded in fraud (*k*); for a tenant is never permitted to question the title of his landlord to demise. (*l*)

Riens in arrear.

The plea of *riens in arrear* admits the demise as stated (*m*), and only puts in issue the satisfaction of the rent; but the plaintiff must shew the whole rent satisfied, for the defendant will be entitled to a verdict, although it appear that less rent is in arrear than he has alleged. (*n*) If a demand, in respect of interest on

(*a*) Holland v. Lancaster, 2 Vent. 132. Com. Dig. Pleader, (3 K. 28). Clears v. Stevens, 2 B. Moore, 464.

(*b*) Com. Dig. Pleader, (3 K. 20).

(*c*) *Ante*, p. 636.

(*d*) Forty v. Imber, 6 East, 434. *Ante*, p. 636.

(*e*) Rogers v. Pitcher, 6 Taunt. 202. *Ante*, p. 584.

(*f*) See *ante*, p. 584.

(*g*) Hegan v. Johnson, 2 Taunt. 148. Dunk v. Hunter, 5 B. and A. 322. As to agreements for leases, see *ante*, p. 518.

(*h*) Sullivan v. Stradling, 2 Wils. 208. As to *nil habuit* in debt, see *ante*, p. 474.

(*i*) Alchorne v. Gomme, 2 Bingh. 54.

(*k*) Parry v. House, Holt's N. P. C. 489.

(*l*) *Ante*, p. 583.

(*m*) Hill v. Wright, 2 Esp. N. P. C. 669.

(*n*) Cobb v. Bryan, 3 B. and P. 348. See *ante*, p. 636.

a mortgage, affecting the premises, is paid with the landlord's assent, the tenant, though he cannot plead a set off (*a*), may avail himself of the payment under the plea of *riens in arrear*. (*b*) The plaintiff may plead in bar *riens in arrear* as to part, and a tender as to the residue (*c*)

Of the plea in bar.

To avowry for rent arrear.

The plaintiff may plead in bar, that he has paid the ground rent to the superior landlord, under threat of distress, to the amount of the rent in arrear (*d*); so he may plead payment of the amount of rent, under threat of distress, to the grantee of a rent charge. (*e*)

Payment to ground landlord, &c.

To an avowry for rent the plaintiff may plead in bar, an eviction or expulsion from the demised premises, which occasions a suspension of the rent. (*f*) The plea must shew an absolute eviction or expulsion, and not a mere trespass. (*g*)

Eviction.

A tender of the rent at the day makes the distress unlawful (*h*), and may, therefore, be pleaded in bar to an avowry for such rent, but the money need not be brought into court on such plea of tender. (*i*)

Tender.

In case of a distress of growing crops under the statute 11 Geo. 2, c. 19, it is enacted by sec. 9 of that statute, that if after any such distress, the tenant shall pay to the landlord, or to the steward appointed to receive the rent, the whole rent, which shall be then in arrear, together with the costs of making the distress, the same shall cease, and the corn, &c. so distrained be delivered up to the tenant.

The plaintiff cannot reply *de injuriâ suâ propriâ absque tali causâ* to an avowry for rent, but must traverse some particular obligation in the avowry. (*k*) Where an indenture is specially stated in the avowry, he may plead *non est factum*. (*l*) The plea in bar, that the defendant abused the distress, and there-

De injuriâ.

Non est factum.

Abuse of distress.

(*a*) Barnes, 450. Sapsford v. Fletcher, 4 T. R. 512.

(*b*) Dyer v. Bowley, 2 Bingh. 98.

(*c*) Com. Dig. Pleader, (3 K. 20).

(*d*) Sapsford v. Fletcher, 4 T. R. 511.

(*e*) Taylor v. Zamira, 6 Taunt. 524. 2 Marsh. 220, S. C.

(*f*) *Ante*, p. 457.

(*g*) *Ibid.* and see Taylor v. Zamira, 6 Taunt. 527.

(*h*) See *post*.

(*i*) Horne v. Lewin, 1 Ld. Raym. 644. See 2 B. and B. 256. Bull. N. P. 60.

(*k*) Jones v. Kitchen, 1 Bos. and Pul. 76. 2 Saund. 284, d. notes, 5th edit.; but such plea, to conusance for damage feasant, is good after verdict. Mahady v. Gallagher, 1 Irish T. R. 161. Com. Dig. Pleader, (F. 24).

(*l*) Adams v. Duncalf, 5 B. Moore, 475.

Of the plea in bar.

fore became a trespasser *ab initio* (*a*), is taken away in cases of distresses for rent by the statute 11 Geo. 2, c. 19, s. 19. (*b*)

To avowry for rent arrear.

The plaintiff may plead in bar to the avowry a prior distress by the defendant for the same rent, but it is necessary in such plea to shew that the distress produced a satisfaction of the rent. (*c*)

Former distress.

Statute of limitations.

By statute 32 H. 8, c. 2, s. 3, no person shall make any avowry or cognisance for any rent, suit, or service, and allege any seisin of any rent, &c. in the same avowry or cognisance in the possession of his ancestor, or in his own possession, or in the possession of any other, whose estate he shall pretend or claim to have, above fifty years next before making avowry or cognisance.

This statute does not make it necessary to allege seisin in an avowry, in cases in which it was not necessary to allege seisin before the passing of the statute, as in case of a reservation, or grant of a rent. (*d*)

To avowry for damage feasant.

Where the defendant has set out his title specially in his avowry for taking cattle damage feasant, the plaintiff may traverse the seisin in fee, or the demise, &c. as stated, or, if the defendant has avowed for damage feasant "in his soil and freehold," the plaintiff may plead in bar, that it is his own soil and freehold. (*e*) So the plaintiff may plead, that before the time when, &c. the defendant demised to him the *locus in quo* for years.

Defect of fences.

The plaintiff may likewise plead in bar, that the cattle escaped into the *locus in quo*, through defect of fences (*f*), which the defendant was bound to repair. (*g*) To this plea the defendant may state, by way of replication, that the plaintiff had notice of the cattle being upon the *locus in quo*, and suffered them to continue there after such notice. (*h*)

(*a*) 2 Lutw. 1423.

(*b*) So by the new highway act, 3 G. 4, c. 126, s. 144, no irregularity in the party distraining under that or any other turnpike act shall make him a trespasser *ab initio*.

(*c*) Lingham v. Warren, 2 B. and B. 36. 4 B. Moore. 409, S. C.

(*d*) Foster's case, 8 Rep. 65, a. Moor, 31. 1 Brownl. 170. Doct. Pl. 310.

(*e*) Com. Dig. Pleader, (3 K. 22).

(*f*) See *post*, in "Trespass," and title "Fences," in index.

(*g*) See Dovaston v. Payne, 2 H. Bl. 527.

(*h*) Edwards v. Halinder, 2 Leon. 98. 2 Saund. 285, notes, 5th edit.

Of the plea in bar.

So in bar to an avowry for damage feasant the plaintiff may prescribe for a right of way (*a*), and the defendant may either traverse the prescription, or plead *extra viam*. (*b*)

To avowry for damage feasant.

So the plaintiff may plead in bar a right of common (*c*) over the *locus in quo*.

Right of way. Common.

The plaintiff may reply an abuse of the distress to an avowry for damage feasant, for such abuse renders the defendant a trespasser *ab initio*, the statute 11 Geo. 2, c. 19, s. 19, applying only to distresses for rent. (*d*)

Abuse of distress.

Tender of amends.

Tender of amends before the distress makes the taking wrongful, and may be pleaded in bar to an avowry for damage feasant. (*e*) Tender upon the land before the distress makes the *distress* tortious; tender after the distress and before the impounding makes the *detainer*, and not the taking wrongful; but tender after the impounding makes neither the one nor the other wrongful, for it then comes too late, the cause being put, it is said, to the trial of the law, to be there determined. But, after the law has determined it, and the avowant has a return irreplevisable, if the plaintiff makes a sufficient tender of amends, he may have an action of detinue for the subsequent detainer, or he may, upon satisfaction in court, have a writ for the delivery of his goods. (*f*)

To avowry under the stat. 43 Eliz. c. 2, for poor's rate.

Where the defendant avows the taking of the goods as a distress for poor's rates under the statute 43 Eliz. c. 2, s. 19, the plaintiff may plead in bar *de injuriâ suâ propriâ absque tali causâ* (*g*); and so where the defendant avows under the statute of sewers (*h*), the statutes expressly giving this general plea in bar.

To avowry for customary demand.

So where the defendant avowed as bailiff of the lord of a

(*a*) Com. Dig. Pleader, (3 K. 25). See *ante*, p. 365; and *post*, in "Trespass," and title "Way" in the index.

(*b*) Com. Dig. *ubi sup.*

(*c*) Com. Dig. Pleader, (3 K. 24). See *ante*, p. 366; and *post* in "Trespass;" and title "Common," in the index.

(*d*) Fox v. Smith, Irish T. Rep. 34.

(*e*) Com. Dig. Pleader, (3 K. 23).

(*f*) Note by the reporter, 6 Carpenters' case. 8 Rep. 147, a. See also Pilkington's case, 5 Rep. 76, a. Cro. Eliz. 813, S. C. 2 Inst. 107, 341. Gilb. Repl. 66; but see Neville v. Seagrave, Cro. Eliz. 332, and *quære* whether trover or detinue will not lie upon tender after impounding. But an action on the case will not lie. Anscomb v. Shore, 1 Campb. N. P. C. 285. Sheriff v. James, 1 Bingh. 341.

(*g*) Herbert v. Walters, 1 Ld. Raym. 59. 1 Salk. 205, S. C. Dewell v. Marshall, 3 Wils. 442. Com. Dig. Pleader, (F. 18).

(*h*) Stat. 23 H. 8, c. 5. Co. Litt. 283, a.

Of the plea in bar.

manor for the penalty of a bye-law made within the manor, *de injuriâ suâ propriâ absque tali causâ* was held to be a good plea in bar. (*a*)

Of the issue and verdict.

The issue in replevin is made up as in other cases, with this difference, that both parties being actors, either the plaintiff or defendant may make up the issue or paper-book. The defendant, therefore, may proceed to trial without a proviso (*b*), and consequently cannot have judgment against the plaintiff, as in case of a nonsuit, under the statute 14 G. 2, c. 17. (*c*) The issue may be entered of record by either party, and as both are actors, there is no rule to enter the issue, nor as it seems, can there be judgment for not entering the issue. The record and jury process, and other proceedings before trial, are the same as in other actions. (*d*)

On a verdict for the *plaintiff* in replevin, the jury are to give damages for the unlawful taking and detaining of the goods, and, unless the goods have been previously delivered by the sheriff, (which is now invariably the case) and the action has been brought in the *detinet*, damages to the amount of the value of the goods. (*e*) On the home circuit, and in London and Middlesex, it is usual to give four guineas as damages for the detention, being the supposed amount of the replevin bond. (*f*)

Of the verdict.

The verdict should regularly apply to all the issues, but where to an avowry for rent the plaintiff pleaded, 1st. *Non tenuit*, and 2dly, *Riens in arrear*, and the first plea was found for him, the court held, that the second plea thereby became immaterial, and that the proper course was to discharge the jury from finding any verdict upon it, but that, if any verdict was found, it should be for the plaintiff. (*g*)

Upon verdict for the avowant, on an avowry for rent, the jury must, under the statute 17 Car. 2, c. 7, s. 2, inquire concerning the arrears, and the value of the goods or cattle distrained, if the avowant intends to take the benefit of that statute, for under

(*a*) Wells v. Cotterell, 3 Lev. 48. Levinz, J. *diss.* Com. Dig. Pleader, (F. 19).

(*b*) 2 Saund. 336, c. notes, 5th edit. Wilk. Repl. 79.

(*c*) Shortridge v. Hierne, 5 T. R. 400. Tidd's Pr. 823, 8th edit.

(*d*) Wilk. Repl. 80.

(*e*) Gilb. Repl. 239. Wilk. Repl. 85.

(*f*) Wilk. Repl. 85.

(*g*) Cossey v. Diggons, 2 B. and A. 546.

that statute the avowant is to have judgment for such arrears, or so much as the goods or cattle distrained amount to. He should therefore be prepared with proof, not only of the amount of the rent, but also of the value of the distress. (*a*) The neglect of the jury in this case cannot be supplied by writ of inquiry. (*b*)

Of the issue and verdict.

So in cases within the statutes 7 H. 8, c. 4, and 21 H. 8, c. 19, the jury ought to find the damages, but the omission in this case may be remedied by a writ of inquiry. (*c*)

Of the costs.

For the plaintiff.

The plaintiff in replevin being entitled at common law to recover damages, may have his costs by the statute of Gloucester, 6 Ed. 1, c. 1, s. 2, which gives costs in all cases in which the plaintiff was entitled to damages. A defendant in replevin, residing out of the jurisdiction of the court, may be compelled to give security for costs. (*d*)

For the defendant.

Statutes 7 H. 8, and 21 H. 8.

By the statutes 7 H. 8, c. 4, and 21 H. 8, c. 19, s. 3, the defendant in replevin or second deliverance, making avowry, cognisance, or justification, for rents, customs, or services, or for damage feasant, if the avowry, cognisance, or justification, be found for him, or the plaintiff be nonsuit, or otherwise barred, is entitled to costs as well as damages. These statutes extend to an avowry by an executor (*e*), and it is said, that it has been the practice to give damages and costs under them to avowants, in avowries for amercements in leets, and for heriots, and in other cases not mentioned in the statutes (*f*), but this practice appears to be incorrect, and is at variance with other authorities. (*g*) Where the defendant has judgment on a plea in abatement, he is not entitled to his costs under these statutes. (*h*)

Stat. 4 Jac. 1.

The statute 4 Jac. 1, c. 3, which enacts, that if any person shall commence any action in any court, wherein the plaintiff or demandant might have costs, in case judgment should be given for

(*a*) See *post*, p. 648.
(*b*) *Ibid.*
(*c*) See *post*, p. 647.
(*d*) Selby v. Crutchley, 1 B. and B. 505.
(*e*) Farnell v. Keightley, 2 Rol. Rep. 457.
(*f*) Haselop v. Chaplin, Cro. Eliz. 329. Owen, 13 S.C.
(*g*) Porter v. Gray, Cro. Eliz. 300. Samuel v. Hoder, Cro. Jac. 520. 2 Rol. Rep. 74, S.C. And see Mackworth v. Shipward, Cro. Jac. 28; but see Tidd's Pr. 1013, 8th edit. Com. Dig. Costs, (A. 4).
(*h*) Smith v. Walgrave, Com. Rep. 122. 2 Ld. Raym. 788, S.C.

Of the costs.

For the defendant.

him, and the plaintiff after appearance be nonsuited, or a verdict pass against him, the defendant shall have his costs, is not confined to suits commenced in the superior courts; and, where a defendant removed the proceedings by *recordari*, from the county court into the King's Bench, and signed judgment of *non pros*, on the plaintiff's not appearing, he was held to be entitled to his costs under this statute. (*a*)

Stat. 17 Car. 2.

Where the defendant proceeds under the statute 17 Car. 2, c. 7, s. 2, and has judgment for the arrearages of rent, or the value of the goods distrained, he is by the words of the statute entitled to *full costs*.

Stat. 11 G. 2, c. 19.

By statute 11 Geo. 2, c. 19, s. 22, if the plaintiff in an action of replevin founded upon a distress for rent, quit rents, relief, heriot, or other service, shall become nonsuit, discontinue his action, or have judgment against him, the defendant shall recover *double* costs of suit. This statute does not extend to a distress for a rent-charge (*b*), or to a seisure for a heriot-*custom* (*c*), nor to a distress for a rent-charge under a canal act (*d*); but, where the defendants avowed generally under the statute 11 Geo. 2, c. 19, for rent due on a demise, under which the plaintiff held as their tenant, and at the same time pleaded many other avowries, in various rights, from which circumstance it was suggested that they did not distrain as landlords, but merely with a view to try the title, the court of Common Pleas held that they were entitled to double costs under this statute. (*e*) There are only three cases in which this statute gives double costs, viz. where the plaintiff is nonsuit, discontinues his suit, or has judgment against him, and therefore, where the cause, being at issue, the parties agreed by bond to submit to arbitration, the costs to abide the event, and the arbitrator awarded in favour of the defendant, it was held that he was not entitled to double costs. (*f*)

Where there are several avowries or pleas in bar.

Where there are several avowries or pleas in bar in replevin, and some of the issues joined thereon are found for the plaintiff,

(*a*) Davies v. James, 1 T. R. 373.

(*b*) Lindon v. Collins, Willes, 429.

(*c*) Lloyd v. Winton, 2 Wils. 28. Barnes, 148, S. C.

(*d*) Leominster Canal Company v. Morris, 7 T. R. 500. 1 Bos. and Pul. 213, S. P.

(*e*) Johnson v. Lawson, 2 Bing. 341. The avowant on a distress for poor's rates is only entitled to single costs under the stat. 43 Eliz. c. 2, s. 19. Butterton v. Furber, 1 B. and B. 517. 4 B. Moore, 296, S. C.

(*f*) Gurney v. Buller, 1 B. and A. 670.

Of the costs.

and some for the defendant, the party for whom the issues are found, which entitle him to judgment on the whole record, shall have the general costs of the cause (*a*), but the other party shall be allowed to deduct therefrom the costs of the issues found for him, unless the judge who tried the cause certify that the party entitled to judgment had a probable cause to make the avowries, or plead the pleas, upon which such issues were joined. (*b*) The costs of such issues include not only the costs of the pleadings, but also such parts of the briefs, and expenses of witnesses, as relate to the trial of those issues. (*c*) If the judge certify (which he need not do in court at the trial of the cause) (*d*) the costs of the issues found for the other party shall not be deducted. (*e*)

If an avowant in replevin, after trial and verdict for the plaintiff, obtains judgment *non obstante veredicto*, in consequence of the plaintiff's pleas in bar being bad, he is not entitled to any costs upon the pleadings subsequent to the pleas in bar, for he should have demurred to them. (*f*)

Of the judgment.

For the plaintiff. On confession, default, demurrer, or verdict.

If the defendant confesses the action, final judgment is entered up for the damages confessed. If he suffers judgment by default, the plaintiff must issue a writ of inquiry, under which damages will be assessed for the taking and detention of the goods, and where the goods have not been previously delivered by the sheriff to the plaintiff, and the action has been brought in the *detinet*, for the value of the goods (*g*), and so where judgment is given for the plaintiff on demurrer. (*h*) Where the plaintiff has a verdict, the jury find the damages he has sustained by reason of the unjust taking and detaining, and judgment is entered for such damages. (*i*)

For the defendant on demurrer.

At common law, when judgment was given for the avowant or person making cognisance, on demurrer, the form was to award

(*a*) Tidd's Pr. 712, 8th edit.
(*b*) *Ibid.* Dodd v. Joddrell, 2 T. R. 235.
(*c*) *Ibid.* Brooke v. Willet, 2 H. Bl. 435. Vollum v. Simpson, 2 Bos. and Pul. 368. Cook v. Green, 5 Taunt. 594. Othir v. Calvert, 1 Bing. 275.
(*d*) Barnes, 141.
(*e*) Dodd v. Joddrell, 2 T. R. 237.
(*f*) Da Costa v. Clarke, 2 B. and P. 376.
(*g*) Com. Dig. Pleader, (3 K. 29). Wilk. Repl. 43.
(*h*) 2 Towns. Judgm. 203.
(*i*) Bennet v. Holbech, 2 Saund. 315. Com. Dig. Pleader, (3 K. 29).

Of the judgment.

For the defendant on demurrer.

a return (*a*) of the cattle or goods distrained, to the avowant. (*b*) No damages or costs were recoverable by the avowant at common law, but by statute 7 Hen. 8, c. 4, s. 3, it is enacted that every avowant and other person, that makes avowry or cognisance, or justifies as bailiff in any replevin or second deliverance for any rent, custom, or service, if his avowry, cognisance, or justification, be found for him, or the plaintiff be otherwise barred, shall recover his damages and costs which he has sustained, as the plaintiff should have done, if he had recovered. And by statute 21 Hen. 8, c. 19, s. 3, it is enacted that every avowant and other person that makes any avowry, justification, or cognisance, as bailiff or servant in any replevin, or second deliverance for rents, customs, services, or for *damage feasant*, or other rent, upon any distress, taken in any lands or tenements, if the same avowry, cognisance, or justification be found for him, or the plaintiff in the same be *nonsuit*, or otherwise barred, shall recover his damages and costs against the said plaintiff, as he should have done if he had recovered therein against the said defendant. (*c*)

Under these statutes the avowant may sue out a writ of *retorno habendo*, and a writ of inquiry either in the same or in separate writs (*d*), and, upon the return thereof by the sheriff, final judgment may be entered up for the defendant to recover, as well the damages and costs assessed by the jury, as the costs adjudged by the court, and the defendant may enforce the payment of them by a *capias ad satisfaciendum*, or *fieri facias*. (*e*) A writ of second deliverance does not operate as a *supersedeas* to the writ of inquiry under the statutes of Hen. 8, though it is a *supersedeas* of the writ *pro retorno habendo*. (*f*)

Under stat. 17 Car. 2, c. 7.

By statute 17 Car. 2, c. 7, s. 3, it is enacted, that if judgment in any of the king's courts at Westminster, (and by 19 Car. 2, c. 5, the courts of great sessions in Wales, and of the counties Palatine,) be given upon demurrer for the avowant, or him that makes cognisance *for any rent*, the court shall, at the prayer of

(*a*) The judgment on demurrer is for a return of the cattle *irreplevisable*. 2 Inst. 340. 1 Saund. 195, c. notes, 5th edit. But the judgment is good at common law, though it be not adjudged *irreplevisable*. Gamon v. Jones, 4 T. R. 509.

(*b*) *Ibid.*

(*c*) As to the cases to which these statutes extend, see *ante*, p. 643.

(*d*) Thes. Br. 220. Lill. Ent. 609. 3, 2, 4.

(*e*) Thes. Br. 56, 221. 1 Saund. 195, notes, 5th edit.

(*f*) Anon. Latch, 72. Palm. 403. Pratt v. Rutlidge, 1 Salk. 95.

Of the judgment.

the defendant, award a writ to inquire of the value of such distress, and, upon the return thereof, judgment shall be given for the avowant, or him that makes cognisance as aforesaid, for the arrears alleged to be behind, in such avowry or cognisance, if the goods or cattle so distrained shall amount to that value; and in case they shall not amount to that value, then for so much as the said goods or cattle so distrained shall amount unto, together with his full costs of suit, and he shall have execution thereupon by *fieri facias*, or *elegit*, or otherwise, as the law shall require.

For the defendant on demurrer.

It does not appear to be necessary that the jury should inquire under this section of the statute of *the sum in arrear*, which is admitted by the demurrer, but only of the value of the distress. (*a*) It seems that the avowant may either take the judgment given by statute 17 Car. 2, c. 7, without the common law judgment for a return (*b*), or may enter a judgment for a return, in addition to the judgment given by the statute (*c*), for the statute has not altered the judgment at common law; but the plaintiff in such case is to keep his cattle, notwithstanding the award of the writ *de retorno habendo* (*d*), the usual course, however, is to take judgment under the statute only. (*e*)

Fifteen days notice of the execution of the writ of inquiry must be given. (*f*)

For the defendant after verdict.

The judgment for the defendant after verdict, at common law, is that he have a return of the cattle, &c. irreplevisable (*g*), and if the distress has been either for rent, customs, services, or damage feasant, for damages, pursuant to the statutes 7 H. 8, c. 4, s. 3, and 21 H. 8, c. 19, s. 3. (*h*) If the jury omit to find damages under these statutes, the omission may be supplied by a writ of inquiry (*i*), and so if they omit to find the treble damages, where the defendant has avowed under the statute 43 Eliz. c. 2, s. 19, for poors rate. (*k*)

(*a*) Mounson v. Redshaw, 1 Saund. 195. 2 Saund. 286, notes, 5th edit.

(*b*) *Ibid.*

(*c*) Baker v. Lade, Carth. 253.

(*d*) Cooper v. Sherbrooke, 2 Wils. 117.

(*e*) Tidd's Pr. Forms, 691, 5th edit.

(*f*) Burton v. Hickey, 6 Taunt. 57. 1 Marsh. 444, S. C.

(*g*) Com. Dig. Pleader, (3 K. 30). 2 Inst. 340. 1 Saund. 195, c. notes, 5th edit.

(*h*) 2 Towns. Judgm. 206.

(*i*) Valentine v. Fawcett, cases *temp.* Hardw. 140. 1 Saund. 195, c. notes, 5th edit.

(*k*) Dewell v. Marshall, 3 Wils. 442. 2 W. Bl. 921, S. C. Valentine v. Fawcett, cases *temp.* Hardw. 138. 2 Str. 1021, S. C. 1 Saund. *ubi sup.*

Of the judgment.

For the defendant after verdict. Stat. 17 Car. 2, c. 7, s. 2,

Where the distress is for *rent*, it is enacted by the statute 17 Car. 2, c. 7, s. 2, that in case the plaintiff shall be *nonsuit*, after cognisance or avowry made and issue joined, or *if a verdict shall be given* against the plaintiff, then the jurors, who were impanelled or returned, to inquire of such issue, shall, at the prayer of the defendant, inquire concerning the sum of the arrears, and the value of the goods or cattle distrained; and thereupon the avowant, or he that makes cognisance, shall have judgment for such arrearages, or so much thereof as the goods or cattle distrained amount unto, together with his full costs, and shall have execution for the same by *fieri facias* or *elegit*, or otherwise as the law shall require.

As the statute directs, that *the jurors who are impanelled or returned to inquire of the issue*, shall inquire concerning the sum in arrear and the value of the distress, the omission of this finding cannot be supplied by a writ of inquiry (*a*); but the defendant may waive the benefit of the statute 17 Car. 2, c. 7, and take the common law judgment *pro retorno habendo* (*b*), and even where he has entered an erroneous judgment under the statute of Charles 2, the court, on error brought, will allow him to amend, and enter the common law judgment (*c*), for it is not compulsory upon him to avail himself of the statute of Charles 2. (*d*)

For the defendant on nonsuit of the plaintiff at common law.

The judgment for the defendant at common law, when the plaintiff has been nonsuit either before or after verdict, is that he have a return of the cattle, &c.; but such return is not irreplevisable, as in the case of judgment on demurrer or verdict (*e*), to remedy which mischief the statute of Westminster 2 gives the writ of second deliverance. (*f*) Where the plaintiff is nonsuit before avowry or cognisance, it is necessary for the defendant to make a cognisance or avowry *pro retorno habendo*, to entitle himself to damages within the statutes of 7 Hen. 8, and 21 Hen. 8, but such suggestion of an avowry is not traversable (*g*)

(*a*) Sheape v. Culpepper, 1 Lev. 255. 1 Sid. 380, S. C. Herbert v. Walters, 1 Lord Raym. 59. 1 Salk. 205, S. C. 1 Saund, 195, b. notes, 5th edit.

(*b*) *Ibid.*

(*c*) Rees v. Morgan, 3 T. R. 349.

(*d*) Hefford v. Alger, 1 Taunt. 218.

(*e*) Br. Ab. *retorn de avers*, 23. Gilb. Repl. 246. 1 Saund. 195, d. notes, 5th edit. Vin. Ab. Replev. (M).

(*f*) See *post*, p. 653.

(*g*) Anon. 1 Salk. 94. 1 Saund. 195, e. notes, 5th edit. Where the plaintiff is nonsuit at the trial, the jury may

Of the judgment.

For the defendant on nonsuit before issue joined, under stat. 17 C. 2, c. 7, s. 2.

In case of a distress *for rent*, it is enacted by statute 17 Car. 2, c. 7, s. 2, that whensoever any plaintiff in replevin shall be nonsuit before issue joined, in any suit of replevin by plaint or writ lawfully returned, removed, or depending, that the defendant making a suggestion in nature of an avowry or cognisance for such rent, to ascertain to the court the cause of distress, the court on his prayer shall award a writ to the sheriff of the county, where the distress was taken, to inquire by the oaths of twelve good and lawful men of his bailiwick, touching the sum in arrear at the time of such distress taken, and the value of the goods or cattle distrained, and thereupon notice of fifteen days shall be given to the plaintiff, or his attorney in court, of the sitting of such inquiry: and thereupon the sheriff shall inquire of the truth of the matters contained in such writ, by the oaths of twelve good and lawful men of his county, and upon the return of such inquisition, the defendant shall have judgment to recover against the plaintiff the arrearages of such rent, in case the goods or cattle distrained shall amount unto that value, and in case they shall not amount to that value, then so much as the value of the said goods and cattle so distrained, shall amount unto, together with full costs of suit, and shall have execution thereupon by *fieri facias* or *elegit*, or otherwise as the law shall require. (*a*)

The writ of inquiry under this statute, should be as well of the amount of *the rent in arrear*, as of the value of the distress, for the amount of the rent is not admitted as in case of a demurrer. (*b*) If the plaintiff is nonprossed for want of a plea in bar, after the defendant has avowed, it does not appear to be necessary to make the suggestion mentioned in the statute, the cause of the distress being ascertained by the avowry. (*c*)

Where the defendant takes judgment for the arrears under this clause of the statute, he may also enter a judgment for a return (*d*), and it appears to be in the election of the defendant,

assess the damages for the avowant, under the statutes of H. 8. Gardner v. Hobbs, 5 Mod. 76. Harcourt v. Weeks, 5 Mod. 77. Valentine v. Fawcett, Ca. *temp.* Hardw. 140. Herbert v. Walters, 1 Lord Raym. 59. Or he may have a writ of inquiry. *Ibid.*

(*a*) See form of a writ of inquiry under this statute. Lill. Ent. 601. Wilk. Repl. 191.

(*b*) 2 Saund. 286, notes, 5th edit. *Ante*, p. 647.

(*c*) 2 Saund. *ubi sup.*

(*d*) Turner v. Turnor, 2 B. and B. 107. Wilk. Repl. 182. *Ante*, p. 647.

Of the judgment.

whether he will take out his common law execution for a return, or that given by the statute for the arrears of rent. (*a*)

For the defendant on nonsuit after issue joined, upon statute 17 C. 2, c. 7, s. 2.

A writ of second deliverance is not a *supersedeas* to the writ of inquiry under this statute. (*b*)

The clause of the statute 17 Car. 2, c. 7, s. 2, which relates to judgment for the defendant, on the *nonsuit* of the plaintiff, *after issue joined*, has already been stated. (*c*)

Of the execution.

The plaintiff, having recovered judgment for damages and costs, may have execution by writ of *capias ad satisfaciendum*, *fieri facias*, or *elegit*.

For the defendant the executions are, 1. For a return of the cattle, &c. 2. For the damages and costs given by the statutes 7 H. 8, c. 4, and 21 H. 8, c. 19, and thirdly, for the arrearages of rent and costs under the statute 17 Car. 2, c. 7.

Retorno habendo.

1. The execution for a defendant who has judgment after having avowed or made cognisance, is at common law, a writ *de retorno habendo*, which is issued by the filacer in the King's Bench, and by the prothonotaries in the Common Pleas. (*d*) This writ recites the proceedings and judgment in replevin, and commands the sheriff to cause the cattle or goods to be returned to the defendant, to hold to him irreplevisable after judgment on demurrer or verdict (*e*); or upon nonsuit before or after issue joined (*f*), that he do not deliver them on the complaint of the plaintiff, without the king's writ (of second deliverance) which shall make express mention of the judgment.

If the cattle or goods are eloigned or removed by the plaintiff, so that the sheriff cannot deliver them to the defendant, then upon the sheriff's return of *elongata*, the defendant may have a *capias in withernam* (*g*), commanding the sheriff to take in withernam the cattle, goods, and chattels of the plaintiff, to the value of the cattle, goods, and chattels before taken, to be delivered to the defendant, to hold to him till the sheriff can cause to be

(*a*) Turner v. Turnor, 2 B. and B. 111.
(*b*) Cooper v. Sherbrooke, 2 Wils. 116.
(*c*) *Ante*, p. 648.
(*d*) Wilk. Repl. 109.
(*e*) *Ante*, p. 646, note (*a*), 647.
(*f*) *Ante*, p. 648.
(*g*) 2 Leon. 174.

returned the cattle, goods, and chattels, before taken, and to put by gages and safe pledges the plaintiff to answer as well for his contempt, as to the defendant for the damages and injury to him done. If the plaintiff had no cattle, &c. and the sheriff returned *nihil*, it was formerly the practice to issue a *scire facias* against the pledges under the statute of Westminster 2 (*a*), to shew cause why their cattle, to the value of the cattle eloigned, should not be delivered to the defendant. (*b*) If no cause was shewn, a writ issued to take their cattle, but if the sheriff returned *nihil* to the latter writ, a *scire facias* was awarded against the sheriff himself. (*c*) In modern practice upon the return of *elongata* to the writ of *retorno habendo*, it is usual to bring an action on the case against the sheriff for not taking pledges, or for taking insufficient pledges, without any previous *scire facias* against the pledges. (*d*)

Of the execution.

2. Where the defendant has judgment for damages under the statutes 7 H. 8, c. 4, and 21 H. 8, c 19, he is entitled to recover his damages and costs, as the plaintiff would have done if he had recovered, and he may consequently have a *capias ad satisfaciendum*, *fieri facias*, or *elegit*.

Under statutes 7 H. 8, and 21 H. 8.

3. Where the defendant has judgment for the arrearages and costs, under the statute 17 Car. 2, c. 7, he will be entitled to execution by *fieri facias* or *elegit* or, according to the words of the statute, "otherwise as the law shall require." Whether under the latter words the defendant is entitled to have execution by *capias ad satisfaciendum* has not been determined.

Under statute 17 Car. 2.

The statute 27 Eliz. c. 8, which gives a writ of error from the King's Bench to the Exchequer Chamber, does not extend to the action of replevin, it not being an action *first commenced* in the King's Bench within the words of the act. (*e*)

Of the writ of error.

Under the statute 3 Hen. 7, c. 10, which gives costs and damages to the defendant in error, for his delay and wrongful vexation, the plaintiff in replevin below is entitled, on affirmance of a judgment recovered by him below, to his damages and costs (*f*),

(*a*) *Ante*, p. 623.
(*b*) Dorrington v. Edwin, 3 Mod. 56.
(*c*) 1 Saund. 195, a. notes, 5th edit.
(*d*) *Ibid.* Rous v. Patterson, 16 Vin. Ab. 399. Bull. N. P. 60. See post.
(*e*) Farnell's case, 2 Rol. Rep. 434.
(*f*) Golding v. Dias, 10 East, 2.

Of the writ of error.

but an avowant, who has recovered a judgment, which has been affirmed, is not within the statute. (*a*)

Interest is not allowed on an affirmance of a judgment on a replevin bond. (*b*)

Where judgment has been given in an inferior court, not of record, a writ of false judgment lies. If brought upon a judgment in the sheriff's court it is in the nature of a *recordari*, if in another inferior court, not of record, it is in the nature of an *accedas ad curiam*. (*c*)

Staying proceedings.

The court will stay proceedings in replevin on a distress for rent arrear, on the application of the plaintiff upon payment of the rent, and of all costs up to the time of the application, including the costs of the application (*d*), but not upon payment of costs up to the time of tender, where such tender was made after the distress, and before the goods were replevied. (*e*)

Where the defendant in replevin, having made cognisance as constable of a township for certain palfrey rent, moved to stay the proceedings on payment of costs by him, the court thought that both parties being actors in replevin, the plaintiff had a right to his judgment, and refused a rule (*f*); but in a subsequent case, where the defendant made cognisance as bailiff of the commissioners appointed by an inclosure act (50 G. 3, c. 39), and after several pleas in bar pleaded, obtained a rule to stay proceedings upon payment of the costs of the action, and distress to be taxed by the master, and upon delivering up the replevin bond to be cancelled, the court, after observing that the plaintiff had got his goods again, and did not make any claim in respect of special damage for the detention, made the rule absolute on the terms prayed, together with the costs of replevying. (*g*)

Of the writ of recaption.

If pending the replevin, the defendant again distrains for the same cause for which the former distress was taken, the plaintiff in replevin may have a writ of recaption, in which he shall re-

(*a*) Cone v. Bowles, 4 Mod. 7. Golding v. Dias, 10 East, 2.
(*b*) Anon. 4 Taunt. 30.
(*c*) Tidd's Pr. 1246, 8th edit. Wilk. Repl. 129.
(*d*) Vernon v. Wynne, 1 H. Bl. 24.
(*e*) Hopkins v. Shrole, 1 B. and P. 382.
(*f*) Hodgkinson v. Snibson, 3 B. and P. 603.
(*g*) Banks v. Brand, 3 M. and S. 525.

cover damages for the second distress taken, and in which the party who took such distress shall be fined for the wrong. (*a*) No pledges *de retorno habendo* are found upon a writ of reception. (*b*)

Of the writ of reception.

A writ of reception lies where the party distrains other cattle of the plaintiff, than those first distrained, if it is for the same cause (*c*), and it lies where the second distress is made by bailiff, by the command of the original distrainor; but if made by the bailiff without such command, trespass or replevin must be brought. (*d*) If A. distrains beasts damage feasant, and, pending that suit, the same, or other cattle of the same owner, trespass on the soil of A. he may distrain again, pending the first suit, because each distress is for a several and distinct trespass, or injury, and no writ of reception lies (*e*), and so no reception lies for a distress taken for rent accruing due pending the suit. (*f*) So also if the lord distrains the beasts of his tenant for rent, and afterwards distrains the beasts of J. S., a stranger, being on the land, for the same rent, no writ of reception lies; not for the tenant, because the second distress is not of his beasts, nor for J. S. because the beasts of J. S. were not taken under the first distress. (*g*)

The party who is distrained may have reception before avowry made in the replevin, and may aver that the defendant in reception distrained for the same cause. (*h*) The defendant in reception cannot avow as in replevin, but must justify as in trespass. (*i*)

Of second deliverance.

At common law when the plaintiff in replevin was nonsuited, the defendant was not entitled to have a return of the distress irreplevisable, the merits of the case not having come in question. The power of bringing fresh replevins being found inconvenient, it was enacted by the statute of Westminster 2, c. 2, that so soon as return of the beasts shall be awarded to the distrainor, the

(*a*) F. N. B. 71 E. Com. Dig. Pleader, (3 K. 32). Gilb. Repl. 263; but in F. N. B. 72 B. it is said, that the plaintiff shall recover damages only for the contempt, and not for the taking or detaining of the cattle; and see 1 Rol. Ab. 890, l. 10.

(*b*) Gilb. Repl. 264.

(*c*) F. N. B. 72 G.

(*d*) F. N. B. 71, F. G.

(*e*) F. N. B. 71 E. Gilb. Repl. 262.

(*f*) Gilb. Repl. 269.

(*g*) F. N. B. 71 H. Gilb. Repl. 266.

(*h*) F. N. B. 72 A.

(*i*) F. N. B. 72 B. Com. Dig. Pleader, (3 K. 32). Gilb. Repl. 264.

Of second deliverance.

sheriff shall be commanded by a judicial writ to make return of the beasts unto the distrainor, in which writ it shall be expressed that the sheriff shall not deliver them without writ, making mention of the judgment given by the justices, which cannot be without a writ issuing out of the rolls of the said justices, before whom the matter was moved. Therefore, where he comes before the justices, and desires replevin of the beasts, he shall have a judicial writ, that the sheriff, taking surety for the suit, and also of the beasts or cattle to be returned, or the price of them (if return be awarded) shall deliver unto him the beasts or cattle before returned, and the distrainor shall be attached to come at a certain day before the justices, afore whom the plea was moved in presence of the parties, and if he that replevied make default again, or for another cause return of the distress be awarded, being now twice replevied, the distress shall remain irreplevisable, but if a distress be taken of new, and for a new cause, the process abovesaid shall be observed in the same new distress.

The writ of second deliverance which is issued by the filacer in the King's Bench, and by the prothonotary in the Common Pleas (*a*), operates as a *supersedeas* to the writ of *retorno habendo* (*b*), but not to the writ of inquiry of damages under the statutes 7 H. 8, and 21 H. 8 (*c*), nor to the writ of inquiry under the statute 17 Car. 2 c. 7. (*d*) In the case, therefore, of a distress for rent, where the avowant takes judgment for the arrears and costs under the latter statute, a writ of second deliverance is nugatory, if the defendant takes out execution for the arrears and costs under the statute. (*e*)

On the plaintiff's declaring in second deliverance, the defendant avows or makes cognisance as in replevin. (*f*)

If the defendant in the writ of second deliverance has judgment, whether by nonsuit of the plaintiff, by abatement of the writ, or by discontinuance of the plea, a return irreplevisable is awarded; but where the distress has been taken for damage feasant, on tender of the damages for which the distress was originally taken, an action of detinue may be brought by the owner

(*a*) Wilk. Repl. 139.

(*b*) 2 Inst. 341.

(*c*) Anon. Latch, 72. Pratt v. Rutlidge, 1 Salk. 95. Bull. N. P. 58.

(*d*) Cooper v. Sherbrooke, 2 Wils. 116.

(*e*) 1 Saund. 195, e. notes, 5th edit. 3 Bl. Com. 150. In Playters v. Sherwing, 1 Vent. 66, the stat. 17 C. 2, c. 7, it is said to have taken away the writ of second deliverance.

(*f*) Com. Dig. Pleader, (3 K. 4).

of the goods, because, notwithstanding the judgment, the goods are only held as a pledge. (*a*)

Of second deliverance.

Proceedings against the sureties.

The form and nature of the bonds which the sheriff is required to take by the statutes of Westm. 2, (13 Ed. 1, c. 2,) and 11 Geo. 2, c. 19, have been already explained. It has also been stated that the condition of the bond under the latter statute, is for prosecuting the suit with effect, and without delay, and for duly returning the goods and chattels distrained, in case a return shall be awarded, to which a condition for indemnifying the sheriff is usually added. (*b*)

Prosecuting the suit with effect, has been held to mean prosecuting with success, and the condition extends to all the proceedings, from the original to the conclusion of the action, and as well in the court below as in the superior court (*c*), and so even where the condition is "to appear in the county court, *and then and there* to prosecute with effect." (*d*) But where the action was stayed by injunction, during which period the plaintiff in replevin died, this was held to be no breach of the condition, because there was neither a nonsuit nor a verdict against the plaintiff. (*e*)

It is to be observed that the condition of the bond is in the conjunctive, to prosecute with effect, *and* to make a return, if awarded. It is said that these are two independent conditions, the plaintiff in replevin being bound to do both, as well to prosecute with effect, as to make return, if it shall be adjudged, and that if he omits to do either, the bond is forfeited. (*f*) It seems to have been considered, that if the avowant takes judgment for the arrears of rent and costs under the statute 17 Car. 2, c. 7, the electing to take such judgment operates as a waiver of the

(*a*) 2 Inst. 341. Glib. Repl. 250. *Ante*, p. 641.

(*b*) Short v. Hubbard, 2 Bingh. 349. *Ante*, p. 625.

(*c*) Morgan v. Griffith, 7 Mod. 381. Chapman v. Butcher, Carth. 248, cases of bonds under the stat. of Westminster 2.

(*d*) Vaughan v. Norris, Cases *temp.* Hardw. 137.

(*e*) Duke of Ormond v. Bierly, Carth. 519. 12 Mod. 380, S. C.

(*f*) *Per* Gibbs, C. J. Moore v. Bowmaker, 7 Taunt. 163. Morgan v. Griffith, 7 Mod. 381, *accord*. But see Phillips v. Price, 3 M. and S. 183, where it is said by Dampier, J. that if the party prosecutes his suit with effect, he need not make a return; and, that if he makes a return, he need not prosecute with effect; *quære* for making a return is not equivalent to prosecuting with effect; for by not prosecuting with effect, the plaintiff in replevin becomes liable for costs and damages, which are not covered by making a return. If the

Proceedings against the sureties.

retorno habendo, and that consequently the avowant cannot proceed against the pledges on the condition for making a return. (*a*) It may, however, be observed, that although the avowant takes judgment under the statute, such judgment being cumulative (*b*), a return may still be awarded, and such return being awarded and no return made, that part of the condition of the bond appears to be broken; at all events a breach may be assigned on the other part of the condition of the bond to prosecute with effect. (*c*)

Under the statute 11 Geo. 2, c. 19 (*d*), the sheriff may assign the replevin bond to the avowant and person making cognisance jointly (*e*), or to the avowant alone (*f*), or to the person making cognisance, where there is no avowant. (*g*) In cases not within the above statute, the action must be brought in the name of the sheriff, as the bond cannot be assigned. An assignment signed, not by the sheriff, but by a person accustomed to act in the sheriff's office, in the name of the sheriff, and under the seal of the office, has been held sufficient. (*h*)

Where the plaintiff makes default in the county court, the assignee of the replevin bond may sue in one of the superior courts at Westminster, although the plaint has never been removed. (*i*)

Declaration.

The venue in an action of debt on a replevin bond is transitory, and the plaintiff may declare either in the *debet* and *detinet*, or in the *detinet* only. (*k*) The declaration states the distress, and where the bond has been taken pursuant to the statute 11 Geo. 2, c. 19, that such distress was for rent; the application to replevy; the taking of the replevin bond and the condition; the plaint levied; the removal of the cause, if such removal took place, and the proceedings to the judgment of *retorno*

construction put upon the bond by Gibbs, C. J. be correct, it will follow, that nothing but a judgment for the plaintiff will be a performance of the condition, *sed quære*, for it is said by Ld. Kenyon, that *returning the goods taken*, will be a satisfaction of the bond. Yea v. Lethbridge, 4 T. R. 435, and see *post*, p. 659.

(*a*) Tidd's Pr. 1079, 8th edit.

(*b*) *Ante*, p. 647.

(*c*) Turner v. Turnor, 2 B. and B. 107.

(*d*) *Ante*, p. 624.

(*e*) Phillips v. Price, 3 M. and S. 180.

(*f*) Archer v. Dudley, 1 Bos. and Pul. 381, n.

(*g*) See Page v. Eamer, 1 Bos. and Pul. 378. Dias v. Freeman, 5 T. R. 197.

(*h*) Middleton v. Sandford, 4 Campb. N. P. C. 36.

(*i*) Dias v. Freeman, 5 T. R. 195.

(*k*) Wilson v. Hobday, 4 M. and S. 120.

habendo. It does not appear to be necessary to state that the writ of *retorno habendo* issued, the condition of the bond being to make a return, if a return shall be *awarded.* A breach is then assigned, and it seems to be sufficient to allege a breach (*a*) of one part of the condition of the bond, either that the plaintiff in replevin did not prosecute with effect, or that he has not made a return (*b*), though it has been said that both parts of the condition must be negatived. (*c*) It is then averred that the bond became forfeited to the sheriff, and, if the action is brought by the assignee of the sheriff, the assignment is stated.

Proceedings against the sureties.

Declaration.

The declaration need not set out the goods and chattels distrained. (*d*)

The sureties are not liable beyond the amount of the penalty of the bond, and the costs in that action. (*e*) They may plead that the action was commenced before breach of the condition of the bond (*f*), but they cannot plead that time has been given to their principal, for it does not, as in the case of bail, prejudice them in their remedy against the principal (*g*); nor where the plaintiff has taken judgment for the arrears of rent and costs under the statute 17 Car. 2, c. 7, can the defendants plead that fact, the declaration alleging a breach for not prosecuting with effect. (*h*) If the plea had stated, that an execution had issued on the judgment, and that the sum recovered had been levied and paid to the avowant, before the commencement of the action on the bond, the case would have assumed a very different shape. (*i*) A plea by the surety, that the judgment was obtained against his principal by fraud, viz. by the plaintiff in collusion with the principal fraudulently procuring the principal to confess the action, and by the principal fraudulently confessing the action, without stating it to be for the purpose of fraudulently deceiving the pledges, is bad. (*k*)

Plea and defence.

(*a*) Replevin bonds are not within the stat. 8 and 9 W. 3, c. 11, s. 8. 2 Saund. 187, note, 5th edit.

(*b*) *Ante*, p. 655.

(*c*) *Per* Dampier, J. Phillips v. Price, 3 M. and S. 183; but see *ante*, p. 655.

(*d*) Phillips v. Price, 3 M. and S. 183.

(*e*) *Per* Lawrence, J. Hefford v. Alger, 1 Taunt. 219.

(*f*) Anon. 5 Taunt. 776.

(*g*) Moore v. Bowmaker, 6 Taunt. 379. 7 Taunt. 97. 2 Marsh. 392, S. C. Hallett v. Mountstephen, 2 D. and R. 343, but see 3 Price, 214.

(*h*) Turner v. Turner, 2 B. and B. 107. 4 B. Moore, 606, S. C.

(*i*) *Per* Dallas, C. J. *Ibid.*

(*k*) Moore v. Bowmaker, 7 Taunt. 97. 2 Marsh. 392, S. C.

Proceedings against the sureties.

Where the plaintiff assigned a breach for not prosecuting the suit according to the tenor and effect of the condition, and the defendant pleaded that he appeared at the county court, &c. and then and there prosecuted the suit which he had commenced, which suit was still depending and undetermined, to which the plaintiff replied, that the defendant did not prosecute his suit as in the plea mentioned, but wholly abandoned the same, and that the said suit was not still depending, the replication was held bad on special demurrer, for it should have shewn *how* the suit had ceased to depend. (*a*) Where to a similar plea the plaintiff replied by traversing the appearance and prosecuting of the suit, it was held, that an agreement (which had been made a rule of court) between the plaintiff and the principal, to stay all the proceedings in replevin upon payment by the latter of a certain sum of money, was evidence, that the suit had not been prosecuted with effect. (*b*)

Where the breach is for not making a return, the plaintiff, after signing final judgment against the defendant for not returning the demurrer-book, may tax the costs and issue execution for the costs and the amount of the goods distrained, without a writ of inquiry. (*c*)

By the statute 11 Geo. 2, c. 19, s. 23, the court in which the action on the replevin bond is brought may by rule give such relief to the parties upon such bond, as may be agreeable to justice and reason, and such rule is to have the nature and effect of a defeasance to such bond.

Proceedings against the sheriff.

If the sheriff has not taken a bond, or, if the pledges he has taken are insufficient, an action on the case may be maintained against him, which action has superseded the former method of proceeding by *scire facias*. (*d*) The courts will not interfere in a summary manner, and grant an attachment where the sheriff has neglected to take a bond, but will leave the party to his remedy by action. (*e*) The action must be brought by the person

(*a*) Brackenbury v. Pell, 12 East, 585.

(*b*) Hallett v. Mountstephen, 2 D. and R. 346.

(*c*) Middleton v. Bryan, 3 M. and S. 155.

(*d*) Moyser v. Gray, Cro. Car. 446. Rouse v. Patterson, 16 Vin. Ab. 399. pl. 4. Bull. N. P. 60. 7 Mod. 387, S. C. *Ante*, p. 651.

(*e*) R. v. Lewis, 2 T. R. 617. Yea v. Lethbridge, 4 T. R. 435. Tesseyman v. Gildart, 1 B. and P. N. R. 291; but see Richards v. Acton, 2 W. Bl. 1290.

who would be entitled to an assignment of the replevin bond; thus, where there is no avowant, the person making cognisance must bring the action. (*a*) The action may be maintained even after the avowant or person making cognisance has taken an assignment of the replevin-bond, and sued the principal and sureties, for such assignment is no waiver of the proceedings against the sheriff. (*b*)

Proceedings against the sheriff.

With regard to the extent to which the sheriff is liable, there has been a considerable difference of opinion. In the case of Rouse v. Patterson (*c*), the plaintiff was allowed to recover the rent in arrear, and the costs in the replevin suit, which together did not exceed the value of the distress. So in Gibson v. Burnell (*d*), Gould, J. was of opinion, that the plaintiff was entitled to recover the costs in replevin as well as the rent in arrear. But, in Yea v. Lethbridge (*e*), the court of King's Bench held, that the plaintiff could not recover damages beyond the value of the distress. This decision was afterwards questioned in the case of Concanen v. Lethbridge (*f*), where it was ruled, that the plaintiff might recover damages to the extent of the injury sustained, although they exceeded the penalty of the bond, viz. double the value of the goods distrained; but in the later case of Evans v. Brander (*g*), this doctrine was overthrown, and it was determined that the sheriff was only liable to the extent to which the sureties themselves would have been liable, viz. to the extent of double the value of the goods distrained. (*h*)

If the defendant pleads not guilty, the plaintiff must be prepared to prove the whole of his declaration. The replevying of the distress may be proved by producing the original precept to deliver, for which purpose a writ of *subpœna duces tecum* should be served upon the bailiff, and, in case the precept has been returned to the sheriff's office, notice to produce it should be served on the defendant's attorney; a recognition of the bailiff's act by the defendant will render such proof unnecessary. (*i*) If a

(*a*) Page v. Eamer, 1 Bos. and Pul. 378.

(*b*) 1 Saund. 195, g. notes, 5th edit.

(*c*) 16 Vin. Ab. 400. See 4 T. R. 434; and 2 H. Bl. 39.

(*d*) Cited in Yea v. Lethbridge, 4 T. R. 434.

(*e*) 4 T. R. 433.

(*f*) 2 H. Bl. 36.

(*g*) 2 H. Bl. 547.

(*h*) In a late *nisi prius* case, Abbot, C. J. is reported to have said, that as the verdict in the replevin suit was merely for a return of the goods, the jury could not in their verdict exceed the value of the goods. Scott v. Waithman, 3 Stark. N. P. C. 171.

(*i*) 2 Phill. Evid. 273, 6th edit.

Proceedings against the sheriff.

bond has been taken, notice to produce it should be given, but, when produced, it will not be necessary for the plaintiff to prove it, by calling the attesting witness, for, as against the sheriff, it must be taken to be a valid bond. (*a*)

Where the action is brought for taking insufficient sureties, some proof of their insufficiency must be given, though very slight evidence is enough to throw the proof on the sheriff. (*b*) The sheriff will be justified in taking a person as a surety, who appears to the world to be a person of responsibility, provided he does not neglect the means in his power of informing himself upon the subject. (*c*) The sureties themselves are competent witnesses to prove their sufficiency or insufficiency (*d*), and what the sureties have said, about the time of executing the bond, in answer to applications by creditors for the payment of debts, has been held to be admissible evidence. (*e*)

(*a*) Scott v. Waithman, 3 Stark. N. P. C. 169. 1 Phill. Evid. 433, 6th edit.

(*b*) Saunders v. Darling, Bull. N. P. 60.

(*c*) Hindle v. Blades, 5 Taunt. 225. Scott v. Waithman, 3 Stark. N. P. C. 170, S. P. As to a replevin clerk in an action by the sheriff against him, see Sutton v. Waite, 8 B. Moore, 27.

(*d*) 1 Saund. 195, g. notes, 5th edit. Hindle v. Blades, 5 Taunt. 226. 2 Phill. Evid. 274, 6th edit.

(*e*) Gwyllim v. Scholey, 6 Esp. N. P. C. 100.

Trespass.

Nature of the injury.

An action of trespass *quare clausum fregit* lies where an immediate injury is committed to land, with force either actual or implied (*a*), and, though the door of the house through which the trespasser entered was open. (*b*) Shooting into a close, so as to strike the soil, is, as it seems, such an entry as will support trespass. (*c*) But, in general, when the injury is not committed on the plaintiff's land, trespass will not lie (*d*), and a mere non feasance, as leaving tithes on lands, is not sufficient to maintain trespass (*e*) Whether trespass is a proper remedy for the continuance of an injury, for the inception of which the plaintiff has already recovered in an action of trespass, appears to be doubtful. (*f*)

By whom.

Trespass *quare clausum fregit* may in general be maintained by any one who is in the actual possession of land, and any possession is a legal possession as against a wrong doer (*g*), and trespass may be maintained by a tenant at will (*h*), or by tenant by sufferance. (*i*)

By those who have an interest or property in the soil.

Trespass *quare clausum fregit* may be maintained either by a person who has a property in the soil, or by one who is entitled to the exclusive possession of land, although he has no property or interest in the soil itself; but the commissioners of sewers

(*a*) Co. Litt. 257, b. Green v. Goddard, 2 Salk. 641.

(*b*) 2 Rol. Ab. 555, l. 18.

(*c*) *Per* Lord Ellenborough, Pickering v. Rudd, 1 Stark. N. P. C. 58. 4 Campb. N. P. C. 219, S. C. *arg.* Keble v. Hickringill, 11 Mod. 74. See Millen v. Hawery, Latch, 13.

(*d*) Haward v. Bankes, 2 Burr. 1114. Keble v. Hickringill, 11 Mod. 74, 130.

(*e*) *Ante*, p. 356.

(*f*) Lawrence v. Obee, 1 Stark. N. P. C. 22; but see Coventry v. Stone, 2 Stark. N. P. C. 534. *Ante*, p. 353. *Quære* whether any action will lie, for the defendant would, it seems, be guilty of a new trespass in entering to abate or remove the cause of the trespass.

(*g*) *Per* Lord Kenyon, C. J. Graham v. Peat, 1 East, 246. Harker v. Birbeck, 3 Burr. 1563. Cary v. Holt, 2 Str. 1238. Lambert v. Stroother, Willes, 221. Catteris v. Cowper, 4 Taunt. 547. Dyson v. Collick, 5 B. and A. 603.

(*h*) 2 Rol. Ab. 551, l. 47, 54. Com. Dig. Trespass, (B. 1). Geary v. Bearcroft, Cart. 66.

(*i*) 2 Rol. Ab. 551, l. 42. Com. Dig. *ubi sup.* Graham v. Peat, 1 East, 244.

By whom.

under the statute 23 Hen. 8, c. 5, have not such a possession in their works as will enable them to maintain trespass for breaking down a wall or dam erected by them across a navigable river. (*a*) Such commissioners have merely a right to enter upon the *locus in quo* for the purpose of doing certain acts. (*b*) So the persons who by statute 16 and 17 Car. 2, are authorised to make navigable certain rivers, have no interest in the soil of a bank formed out of the earth excavated from the channel of a river, so as to entitle them to maintain trespass *quare clausum fregit* for an injury to such bank. (*c*) But, where certain private individuals contracted with the proprietors of a navigation to form a canal, and erected a dam of earth and wood upon a close, with the permission of the owner, for the purpose of completing their work, it was held, that they had a possession sufficient to entitle them to maintain trespass against a wrong doer. (*d*)

But the plaintiff's possession must be actual.

As the *gist* of the action of trespass is the injury to the plaintiff's possession, it is essential that he should be in the actual possession of the land before he can support such action. Therefore a person who has only a seisin in law, as the heir before entry, cannot bring trespass (*e*), nor a bargainee before entry, although the possession is transferred to him by the statute of uses. (*f*) So neither the conusee of a fine (*g*), a devisee (*h*), a surrenderee (*i*), a reversioner after the expiration of an estate for life or years (*k*), nor a lessee for years (*l*), can bring trespass before entry. So a parson before induction cannot support trespass (*m*), but after induction trespass may be maintained for an injury to the glebe lands, although the parson has not actually entered upon that part, for the act of induction puts him into possession

(*a*) Duke of Newcastle v. Clark, 8 Taunt. 602. 2 B. Moore, 666, S. C.

(*b*) Dyson v. Collick, 5 B. and A. 603.

(*c*) Hollis v. Goldfinch, 1 B. and C. 205.

(*d*) Dyson v. Collick, 5 B. and A. 600.

(*e*) 2 Rol. Ab. 553, l. 45. Com. Dig. Trespass, (B. 3). Gilb. Ten. 45.

(*f*) Barker v. Keat, 2 Mod. 251. Green v. Wallwin, Noy, 73. *Per* Bridgman, C. J. Geary v. Bearcroft, Cart. 66. Bridgm. Judgm. 495, S. C. Com. Dig. Trespass, (B. 3). Said to have been much doubted, 1 Vent. 361, *arg.* and see Anon. Cro. Eliz. 46, *contra.*

(*g*) *Arg.* Berry v. Goodman. 2 Leon. 147.

(*h*) Anon. 2 Mod. 7. Geary v. Bearcroft, Bridg. 495.

(*i*) Br. Ab. Surrender, 50.

(*k*) Keilw. 163, a. Trevillian v. Andrew, 5 Mod. 384. Com. Dig. Trespass, (B. 3).

(*l*) Keilw. 163, a. Plowd. 142, *arg.* Bac. Ab. Leases, (M).

(*m*) Plowd. 528. Bac. Ab. Trespass, (B. 3). *Ante*, p. 595, *note*, (*b*).

of part for the whole. (*a*) On the determination of a lease at will by the death of the lessee, the lessor may maintain trespass before entry. (*b*) And if the lessee at will commits voluntary waste, the lessor may immediately maintain trespass against him, for the committing of waste amounts to a determination of the will. (*c*) If the plaintiff was in actual possession at the time of the trespass done, it is sufficient; it is not necessary that he should be in possession at the time of action brought. (*d*)

By whom.

No one can maintain trespass *quare clausum fregit*, unless at the time of the trespass done, he has the *immediate* possession; and therefore the landlord cannot, during the continuance of a subsisting lease for lives or years, bring this action for an injury to the land. (*e*) If the injury was of a substantial nature, case and not trespass is the proper remedy for the lessor. (*f*) The occupation of premises by a servant not paying rent, is the occupation of his master (*g*), and the latter may consequently maintain trespass in his own name. Where trees are excepted in a lease, the lessor may have trespass *quare clausum fregit* against the lessee or a stranger, for cutting them down, for by the exception of the trees, the land on which they grow is excepted also. (*h*)

And immediate.

There are, however, some cases in which, by the doctrine of relation, a person is allowed to recover for trespasses committed to his land, while he was not in actual possession. Thus if a man is disseised, he may bring trespass against the disseisor for the act of disseisin (*i*), and if he re-enters he may have trespass against the disseisor for continuing in possession, or against a stranger for a trespass committed during the disseisin, for by the re-entry he revests the possession in himself *ab initio* (*k*);

Though a possession by relation is sufficient, in some cases.

(*a*) Bulwer v. Bulwer, 2 B. and A. 470. A parson may maintain trespass against a person for preaching in his church without his leave. 12 Mod. 420, 433; or for setting up monuments in his church. 1 B. and A. 508.

(*b*) Co. Litt. 62, b. Geary v. Bearcroft, 1 Lev. 202. Cart. 66, S. C. Com. Dig. Trespass, (B. 2).

(*c*) Lady Shrewsbury's case, 5 Rep. 13, b. Co. Litt. 57, a. *Ante*, p. 385.

(*d*) 2 Rol. Ab. 569, l. 20. Bac. Ab. Trespass, (C. 3).

(*e*) Biddlesford v. Onslow, 3 Lev. 209.

(*f*) Biddlesford v. Onslow, 3 Lev. 209. It was formerly held, that the lessor might maintain trespass during the continuance of a tenancy at will. 2 Rol. Ab. 551, l. 49. Com. Dig. Trespass, (B. 2). See Sir O. Bridgman's note, (l). Bridgm. Judgm. 496.

(*g*) Bertie v. Beaumont, 16 East, 33. R. v. Stock, 2 Taunt. 342.

(*h*) Br. Ab. Trespass, 55. Bac. Ab. Trespass, (C. 3). Ashmead v. Ranger, 1 Ld. Raym. 552; and waste cannot be brought for cutting down such trees. *Ante*, p. 120.

(*i*) 2 Rol. Ab. 553, l. 50. Co. Litt. 257, a. Com. Dig. Trespass, (B. 2).

(*k*) 2 Rol. Ab. 550, l. 7, 554, l. 39. Co. Litt. 257, a. 3 Bl. Com. 210. Vin.

By whom.

though where a fine has been levied with proclamations, the entry of the party will not revest the possession by relation. (*a*)

Where the party has an interest or property in the soil, it is not requisite that he should have an exclusive possession in order to enable him to maintain trespass. Thus where a man has made a street over his close, and dedicated it to the public, he may still maintain trespass for an injury to the soil (*b*), and trespass lies by the owner of a market, though he has dedicated the ground to the public, so that every one has a right to enter there to buy and sell. (*c*)

By those who have no property or interest in the soil.

A person may maintain trespass, although he has not any property or interest in the soil, provided he has a title to the exclusive possession of the *locus in quo*, as one who has the herbage (*d*), or the vesture or pasture (*e*), of a close; and where a person is entitled to the exclusive enjoyment of a crop growing on land, during the proper period of its full growth, and until it be cut and carried away, he may, in respect of such exclusive possession, maintain trespass. (*f*) So where a person has an exclusive right of digging turves (*g*), or a grant of underwood (*h*), though in neither case the soil passes. So the owner of a free-warren, which is a liberty to hunt in another man's ground, may, as it seems, maintain trespass for an injury to such exclusive privilege. (*i*) So it has been held that trespass lies for the owner of a free fishery (*k*), and if J. S. agree with the owner of the soil

Ab. Tresp. (T). *Quære*, whether against a feoffee of the disseisor. Liford's case, 11 Rep. 51, a. Moor, 461. Cro. Eliz. 540. Bull. N. P. 86. Vin. Ab. Tresp. (R. 4). Gilb. Ten. 46. Hob. 98. 1 Rol. Rep. 101. Godb. 388. Com. Dig. Tresp. (B. 2).

(*a*) Compare v. Hicks, 7 T. R. 727. Hughes v. Thomas, 13 East, 486.

(*b*) Lade v. Shepherd, 2 Str. 1004. Bac. Ab. Tresp. (C. 3). So ejectment lies. *Ante*, p. 486.

(*c*) Mayor of Northampton v. Ward, 1 Wils. 107. 2 Str. 1238, S. C.

(*d*) Dyer, 285, b. Co. Litt. 4, b. 2 Rol. Ab. 549, l. 20. Welden v. Bridgwater, Cro. Eliz. 421; and see Burt v. Moore, 5 T. R. 329. Vin. Ab. Trespass, (H).

(*e*) Co. Litt. 4, b. Moor, 302, 355. 2 Rol. Ab. 549. Bull. N. P. 85. Wilson v. Mackreth, 3 Burr. 1827. Parker v. Staniland, 11 East, 366.

(*f*) *Per* Ld. Ellenborough, Crosby v. Wadsworth, 6 East, 609.

(*g*) Wilson v. Mackreth, 3 Burr. 1824.

(*h*) Hoe v. Taylor, Cro. Eliz. 413. Moor, 355, S. C.

(*i*) F. N. B. 86 M. Com. Dig. Tresp. (A. 2). Lord Dacre v. Tebb. 2 W. Bl. 1151. Smith v. Kemp, 2 Salk. 637; but see Welden v. Bridgwater, Cro. Eliz. 421. Trials *per pais*. 536.

(*k*) F. N. B. 88 G. Smith v. Kemp, 2 Salk. 637. Carth. 285, S. C. but see Mr. Hargrave's note to Co. Litt. 122, a. (7). If free fishery be synonymous with common of fishery, trespass would not lie; but otherwise, if it signify an exclusive right. Trespass for fishing in a *several* fishery. F. N. B. 87 G. 88 H. Com. Dig. Tresp. (A. 2.) Brian v.

to plough and sow the ground, and in return to give him half the crop, J. S. may have trespass for treading down his corn. (*a*) If a meadow is divided annually amongst certain persons by lot, then, after the several portion of each person is allotted, each is capable of maintaining trespass *quare clausum fregit*, for each has an exclusive possession for the time. (*b*) By whom.

But where the plaintiff has no interest or property in the soil, and no exclusive possession, but merely a profit *à prendre*, as a right of common, trespass *quare clausum fregit* will not lie (*c*); nor will trespass lie for a person who has a right to sit in a pew. (*d*)

Jointenants (*e*), coparceners (*f*), and tenants in common (*g*), must join in trespass *quare clausum fregit*, and one tenant in common cannot bring trespass against his co-tenant. (*h*) Who must join.

A wall is said to differ in point of ownership from a bank, being an artificial edifice, not formed from the materials of the place where it stands, and the property, therefore, of such wall is in him who is bound to repair it, while the property in a bank follows that of the soil from which it is constructed. (*i*) If two tenants in severalty build a party wall, one-half of the thickness of which stands on the land of each, the wall ensues the tenure of the land, and the owners of the lands are not tenants in common of the wall. (*k*) Rules as to the ownership of walls and banks.

Where two adjacent fields are separated by a hedge and ditch, the hedge *primâ facie* belongs to the owner of the field in which the ditch is not. If there are two ditches, one on each side of the hedge, then the ownership of the hedge must be ascertained by Ditches.

Blake, 11 East, 265. Bennet v. Coster, 1 B. and B. 465. *Ante*, p. 488.

(*a*) Bull. N. P. 85. 11 East, 366. Gilb. Evid. 249, 4th edit. See Hare v. Celey, Cro. Eliz. 143. 1 Leon. 315, S. C.

(*b*) Welden v. Bridgwater, Cro. Eliz. 421. Moor, 302, S. C. Co. Litt. 4, a. 48 b.; and see R. v. Watson, 5 East, 481. 13 East, 159. 1 B. and C. 389.

(*c*) Br. Ab. Tresp. 174. Welden v. Bridgwater, Cro. Eliz. 421. Wilson v. Mackreth, 3 Burr. 1824.

(*d*) Dawtry v. Dee, Palm. 46. *Per* Buller, J. Stocker v. Booth, 1 T. R. 430; and see Clifford v. Wicks, 1 B. and A. 498.

(*e*) Stowel's case, Moor, 466. Com. Dig. Abatement, (E. 9). Bac. Ab. Jointenants, (K).

(*f*) Stedman v. Page, 12 Mod. 86. Co. Litt. 198, a.

(*g*) Stowel's case, Moor, 466. Some v. Barwish, Cro. Jac. 231. Co. Litt. 198, a. Com. Dig. Abatement, (E. 10).

(*h*) Litt. s. 323. Com. Dig. Abatement, (F. 6).

(*i*) Callis on Sewers, 74, 4th edit. See Duke of Newcastle v. Clark, 8 Taunt. 602. 2 B. Moore, 666, S. C. Harrison v. Parker, 6 East, 154.

(*k*) Matts v. Hawkins, 5 Taunt. 20.

By whom. proving acts of ownership. (*a*) The rule about ditching is this: no man making a ditch can cut into his neighbour's soil, but usually he cuts to the very extremity of his own land; he is of course bound to throw the soil which he digs out upon his own land, and often, if he likes it, he plants a hedge upon the top of it; therefore, if he afterwards cuts beyond the edge of the ditch, which is the extremity of his land, he cuts into his neighbour's land, and is a trespasser; no rule about four feet and eight feet has any thing to do with it. (*b*)

Trees. If A. plants a tree at the extreme limit of his own land, and the tree growing extends its roots into the land of B., A. and B. are, it is said, tenants in common of the tree, but if all the roots grow in A's land, though the boughs shadow the land of B. the property is in A. (*c*)

Highways. The waste land adjoining a public highway is presumed in the first instance to belong to the owner of the adjoining land, as the highway itself *usque ad filum* does, and not to the lord of the manor, but as in other cases, this presumption may be rebutted. (*d*) The presumption is to be confined to that extent, and if the narrow strip be contiguous to, or communicate with open commons, or larger portions of land, the presumption is either done away or considerably narrowed, for the evidence of ownership, which applies to the larger portions, applies also to the narrow strip which communicates with them. (*e*)

Rivers. Fresh rivers of every kind, of common right belong to the owners of the soil adjacent; so that the owners of the one side have of common right the property of the soil, and consequently the right of fishing, *usque ad filum aquæ*, and the owners of the other side the right of soil or ownership, and fishing, to the *filum aquæ* on their side. If a man is owner of the land on both sides, by common presumption he is owner of the whole river. (*f*)

(*a*) *Per* Bayley, J. in Guy v. West, Somerset Sum. Ass. 1808. Selw. N. P. 1218, 4th edit.

(*b*) *Per* Lawrence, J. Vowles v. Miller, 3 Taunt. 138.

(*c*) *Per* Holt, C. J. Waterman v. Soper, 1 Lord Raym. 737. Bull. N. P. 85. Anon. 2 Rol. Rep. 255; but see Masters v. Pollie, 2 Rol. Rep. 141, where it is said, that if a tree grows in A.'s close, and roots in B.'s, yet the body of the main part of the tree being in the soil of A. all the residue of the tree belongs to him. As to the ownership of trees in a highway, see Vin. Ab. Trees, (B). 1 Brownl. 42.

(*d*) Steel v. Prickett, 2 Stark. N. P. C. 468. Grose v. West, 7 Taunt. 41; and see Vin. Ab. Chimin, private, (B).

(*e*) Grose v. West, 7 Taunt. 41. *accord.* Headlam v. Hedley, Holt's N. P. C. 463.

(*f*) Hale *de jure maris*, cap. 1. Harg. Law Tracts, 5. R. v. Wharton, 12 Mod.

Trespass *quare clausum fregit* lies against him who did the trespass, and all aiding him (*a*), and a person may become a trespasser by previous command, or, where the trespass has been committed for his use or benefit, by subsequent assent (*b*); but a feme covert and an infant cannot make themselves trespassers either by prior command or subsequent assent. (*c*) Unless there be an actual assent to the trespass, either before or after it was committed, a master is not liable in trespass for the act of his servant; thus if a servant puts his master's beast into another man's land, he only, and not his master, is liable as a trespasser (*d*); but it is said that trespass may be maintained against a man, if his wife puts his cattle into the land of another. (*e*) Against whom.

By statute 6 Anne, c. 18, guardians, trustees, husbands seised in right of their wives, and tenants *pur autre vie* holding over without consent, are declared trespassers, but the act does not extend to tenants for years. (*f*)

The owner of animals *mansuetæ naturæ* is bound to confine them on his own land, and if they escape and commit a trespass to the land of another, unless through the defect of fences, which the latter is bound to repair, the owner is answerable in an action of trespass (*g*), and if the cattle of A. be in the custody of B. and escape and commit a trespass, either A. or B. may, it is said, be sued at the election of the plaintiff. (*h*) But for damage done by animals *feræ naturæ* escaping from the land of one person to that of another, as by rabbits, pigeons, &c. an action cannot be supported. (*i*) For trespass by cattle, &c.

Although where the entry into land is lawful, no action of Trespasses *ab initio*.

510. As to a private stream changing its course. See Hale *ubi sup.* Br. Ab. Encroachm. 3. As to the right of soil in the sea shore, see Hale *de jure maris*, p. 31. Blundell v. Catterall, 5 B. and A. 295. Callis on Sewers, 54. As to land gained from the sea by accretion, Hale, p. 14. Dyer, 326, b. R. v. Ld. Yarborough, 3 B. and C. 91. As to islands arising in the sea, Hale, p. 56. Callis on Sewers, 44.

(*a*) Com. Dig. Trespass, (C. 1).

(*b*) Barker v. Braham, 3 Wils. 377. Badkin v. Powell, Cowp. 476. 4 Inst. 317. Vin. Ab. Trespass, (Q) (R. 2).

(*c*) Co. Litt. 180, b. note (4) 357, b.

(*d*) 2 Rol. Ab. 553, l. 25. Vin. Ab. Tresp. (Q). M'Manus v. Crickett, 1 East, 106. See Smith v. Stone, Styl. 65.

(*e*) 2 Rol. Ab. 553, l. 30. Com. Dig. Tresp. (C. 1). *Sed quære;* and see Keilw. 3, b.

(*f*) Bull. N. P. 85.

(*g*) Keilw. 3, b. 2 Rol. Ab. 568, l. 20. Vin. Ab. Tresp. (B). pl. 1. Com. Dig. Tresp. (C. 1).

(*h*) *Ibid.* Gilb. Evid. 236, 4th edit. but see 1 Saund. 27, *arg.* Bateman's case, Clayt. 33. Bac. Ab. Tresp. (E. 2,) and *ante.*

(*i*) Boulston's case, 5 Rep. 104, b. Hinsley v. Wilkinson, Cro. Car. 387. See Cooper v. Marshall, 1 Burr.

Against whom.

trespass can be supported, yet by a *subsequent abuse* of an authority in law, the party may become a trespasser *ab initio*, though a mere *non feasance* will not render him such. (*a*) Thus a lessor, who enters to view waste, and damages the house, or stays there all night; a commoner who enters to view his cattle, and cuts down trees (*b*), and a man who enters a tavern and continues there all night against the will of the landlord (*c*), an officer who neglects to remove goods attached, within a reasonable time, and continues in possession, are all trespassers *ab initio*. (*d*) A person distraining who remains in possession above five days, and disturbs the plaintiff (*e*), is a trespasser only for the period during which he remains in possession after the five days are expired. The abuse of an authority *in fact* to enter will not in general subject the party to an action of trespass as a trespasser *ab initio*. (*f*)

Who must be joined.

Although, in general, one of several tort-feasors may be sued alone, yet in actions *ex delicto* for injuries to real property, one tenant in common may plead the non-joinder of his co-tenant in abatement. (*g*)

Of the declaration.

Venue. *Quod cum.*

The venue, in an action of trespass *quare clausum fregit*, is local (*h*), and therefore it has been decided that trespass will not lie in the English courts for entering a house in Canada. (*i*)

The declaration must allege the trespass directly and positively, and not by way of recital, *for that*, on such a day, the defendant broke and entered, &c., and not *for that whereas*, but this objection must be taken advantage of on special demurrer; and in the Common Pleas, where the supposed writ is recited in

259. Bac. Ab. Game. If a dog break a neighbour's close, the owner of the dog will not be subject to an action for it. *Per* Holt, C. J. Mason v. Keeling, 1 Ld. Raym. 606. See Millen v. Hawery, Latch, 13. Poph. 162. W. Jones, 131, S. C. Beckwith v. Shordike, 4 Burr. 2093.

(*a*) Vin. Ab. Tresp. (G. a). Com. Dig. Tresp. (C. 2). The Six Carpenters' case, 8 Rep. 146, a.

(*b*) 2 Rol. Ab. 561, l. 27. Six Carpenters' case, 8 Rep. 146, b.

(*c*) Rol. Ab. 561, l. 35. Com. Dig. Tresp. (C. 2). Perk. sec. 191.

(*d*) Reed v. Harrison, 2 W. Bl. 1218. Aitkenhead v. Blades, 5 Taunt. 198.

(*e*) Winterbourne v. Morgan, 11 East, 395. Messing v. Kemble, 2 Campb. N. P. C. 115; and see Etherton v. Popplewell, 1 East, 139.

(*f*) Six Carpenters' case, 8 Rep. 146, b. Bagshaw v. Gaward, Yelv. 96. Perk. sec. 191. Bac. Ab. Tresp. (B).

(*g*) Com. Dig. Abatement, (F. 6). Mitchell v. Tarbutt, 5 T. R. 651. 1 Saund. 291, f. notes, 5th edit.

(*h*) Com. Dig. Pleader, (3 M. 3).

(*i*) Doulson v. Mathews, 4 T. R. 503. Shelling v. Farmer, 1 Str. 646.

Of the declaration.

Continuando.

the declaration, the mistake is aided, and will not be a ground even of special demurrer. (*a*)

Some day must be mentioned, in the declaration, on which the trespass must be alleged to have been committed, but the precise day is not material; and, in case of a single trespass, it will be sufficient to insert any day before the commencement of the action. (*b*) It was formerly usual in actions of trespass *quare clausum fregit*, where there had been repeated acts of trespass, to declare with a *continuando*, that is, to allege that the defendant on such a day committed certain trespasses, (specifying them) *continuing the said trespasses*, from such a day to such a day, *at divers days and times*. But a *continuando* could not be alleged in a trespass, which was not capable of being continued, as where the trespass was one single act, such as cutting down a tree. (*c*) However, where in a declaration, several trespasses were stated, some capable of being continued and others not, and the *continuando* was not confined to the former, the court after verdict said, that they would restrain the *continuando* by intendment to those trespasses, which were capable of continuance. (*d*) And where the trespass was for taking ten loads of wheat, ten loads of barley, and ten loads of oats, continuing the said trespass from, &c. to &c., and there was a verdict for the plaintiff, the judgment was affirmed on error, the court observing, that where there are several things alleged, which may be done at several times, as in the case before them, although the trespass be laid on the first day, yet the *continuando* shall make distribution thereof, that part was done at one day, and part at another, within the time laid. (*e*) And where there were several trespasses laid in the declaration, and the *continuando* was confined to two of them, one of which was not capable of continuance, the court said, that though this was bad upon demurrer, yet that, after verdict, they would intend that no damages had been given for the erroneous *continuando*. (*f*)

(*a*) White v. Shaw, 2 Wils. 203. Wilder v. Handy, 2 Str. 1151. Marshall v. Riggs, 2 Str. 1162. Com. Dig. Pleader, (3 M. 4).

(*b*) Co. Litt. 283, a. Gilb. Evid. 238, 4th edit.

(*c*) 2 Rol. Ab. 549, l. 41. Com. Dig. Pleader, (3 M. 10). 1 Saund. 24, notes, 5th edit. Vin. Ab. Tresp. (I).

(*d*) Gillam v. Clayton, 3 Lev. 93. Brook v. Bishop, 2 Salk. 639.

(*e*) Butler v. Hedges, 1 Lev. 210.

(*f*) Fontleroy v. Aylmer, 1 Lord Raym. 239. As to what trespasses lie in continuance, see Vin. Ab. Trespass, (I) (K). Com. Dig. Tresp. (3 M. 10). Bac. Ab. Tresp. (G. 2, 2). Bull. N. P. 86.

Of the declaration.

The modern form of declaring for a continued trespass is, that the defendant, *on such a day, and on divers other days and times, between that day and the commencement of the suit,* committed the trespasses. (*a*) But an act which terminates on the commission, and which cannot therefore in its nature be continued, should not be laid to have been committed on divers days and times, as it would be bad on special demurrer (*b*); and if so laid, and not demurred to, objection should be made at the trial, and the plaintiff will not be permitted to give evidence of more than one act of trespass. (*c*) If the plaintiff intends to give evidence of repeated acts of trespass, he must confine himself to the time in the declaration, whether it be laid with a *continuando,* or in the modern way of *divers days and times,* but in either case he may, if he please, waive the time in the declaration, and prove a *single* trespass at any time before the action brought (*d*)

Plaintiff's possession.

It must appear on the declaration, that the possession of the land, &c. to which the trespass has been committed was in the plaintiff, as that the defendant broke and entered a certain close "of the plaintiff" (*e*), and this defect is not cured by verdict, but it may be aided by the defendant's plea, admitting a possession in the plaintiff. (*f*)

Certainty and locality of the premises.

It is not necessary to describe the close, &c. to which the injury has been committed, by its name, or to set out the abuttals (*g*), but if it be described by its name or by its abuttals, the proof must agree with the description, and a material variance will be fatal. Thus if the description be "on the south side, abutting on the mill of A.," the plaintiff must prove a mill there, and that it was in the tenure of A.; but it will be sufficient, though there be a highway between them. (*h*) Extreme strictness is not necessary in the proof of abuttals, thus if a close be described as abutting towards the east, but it proves to be north, inclining to east, it will be sufficiently described. (*i*) If the plaintiff declares

(*a*) 1 Saund. 24, (n), 5th edit. See Monkton v. Pashley, 2 Salk. 639. Co. Ent. 648.

(*b*) English v. Purser, 6 East, 395. Mitchell v. Neal, Cowp. 828.

(*c*) 1 Saund. 24 note, 5th edit.

(*d*) *Ibid.* Bull. N. P. 86. Hume v. Oldacre, 1 Stark. N. P. C. 351.

(*e*) Com. Dig. Pleader, (3 M. 9).

(*f*) Brooke v. Brooke, 1 Sid. 184.

(*g*) Martin v. Kesterton, 2 W. Bl. 1089.

(*h*) 2 Rol. Ab. 678, l. 10. BnR. N. P. 89. Gilb. Evid. 237, 4th edit. Dyer, 164, b.

(*i*) 2 Rol. Ab. 678, l. 13. Roberts v. Karr, 1 Taunt. 501.

upon a trespass in a close, setting forth its abuttals, or its name, and proves a trespass in any part of that close, so abutted or named, the jury may find the defendant guilty as to that part, or a verdict may be entered generally for the plaintiff. (*a*) Of the declaration.

Where the *locus in quo* is stated to be situated in a certain parish, the proof must correspond with such statement. (*b*) If it is stated to be in the parish of A., it is enough if A. has a church and overseers of its own, although, perhaps, strictly speaking, it may be only a hamlet. In such an action, the court will not try a question of parochiality. (*c*)

The plaintiff may allege a matter in aggravation of damages, though no action would be maintainable for it by itself, as an entry into his house, and battery of his wife and children. (*d*) But it was formerly held, that where the special damage may be made the subject of a distinct action, as in the above case, if the plaintiff had lost the services of his children, it cannot be recovered as matter of aggravation. (*e*) This distinction, however, is not supported by the modern practice. The rule now generally adopted is said to be, that if the special damage, laid in the declaration, arise out of the trespass committed on entering the house, and the acts done by the defendant to cause such special damage, constitute a part of one entire transaction, of which the trespass in the house was the commencement, the plaintiff will be allowed to prove them, notwithstanding they might have been the ground of a separate action. (*f*) In a late case, where the declaration was for breaking and entering the plaintiff's house, and without probable cause, and under a false and unfounded charge that the plaintiff had stolen property in her house, searching and ransacking the same, and making disturbance, &c., it was held that the trespass was the substantive allegation, and the rest was laid as matter of aggravation only, and that the jury might give damages for the trespass, as aggravated by those accompanying circumstances. (*g*) Special damage.

(*a*) Winkworth v. Man, Yelv. 114. Bull. N. P. 89. Stevens v. Whistler, 11 East, 51.

(*b*) Taylor v. Hooman, 1 B. Moore, 161. Holt's N. P. C. 523, S. C.

(*c*) *Per* Ld. Ellenborough, Anon. 2 Campb. N. P. C. 4, (n). As to *prima facie* evidence of the house being within the parish, see *ante*, p. 582.

(*d*) Newman v. Smith, 2 Salk. 642. Cases *temp.* Holt. 699, S. C. Com. Dig. Pleader, (3 M. 10). Bull. N. P. 89.

(*e*) *Ibid.*

(*f*) 2 Phill. Evid. 184, 6th edit.

(*g*) Bracegirdle v. Orford, 2 M. and S. 77; and see Bennett v. Alcott, 2 T. R. 166. In trespass *quare clausum fregit*, a justification of the breaking and

Of the declaration.

The special damage should be stated in the declaration, or the plaintiff will not be allowed to give evidence of it; thus in a declaration for false imprisonment, he cannot give evidence that he was stinted in his food, or that he caught an infectious disorder. (*a*)

Alia enormia.

The declaration concludes with the words, "and other wrongs to the said plaintiff then and there did, against the peace, &c." Under this general allegation it has been held, that some matters may be given in evidence in aggravation of damages, though not laid at special damage, provided they be a continuation or consequence of the trespass declared on. Thus it has been said, that in trespass for breaking and entering the plaintiff's house, evidence of the defendant having debauched the plaintiff's daughter, may be given by way of aggravation under the *alia enormia*. (*b*) However it seems to be the most convenient and safest rule, not to admit, under this general averment, proof of such facts as the debauching of a daughter, which are entirely unconnected in their nature, and distinct from the substantive ground of the action, (the trespass in entering the house) though in point of time the one may have immediately followed the other. (*c*) In trespass for breaking and entering the dwelling house of the plaintiff, he was allowed to give in evidence that his wife was so terrified by the conduct of the defendants, that she was immediately taken ill, and soon afterwards died; but this was held to be admissible only for the purpose of shewing how outrageous and violent the trespass was, and not as a substantive ground of damage (*d*), and in such an action of trespass, the jury may consider not only the mere pecuniary damage sustained by the plaintiff, but also the intention with which the fact has been done, whether for insult or injury. (*e*)

entering, will cover matter of aggravation, as an expulsion, Bennett v. Allcott *ubi sup.* but not a distinct trespass to the person, Phillips v. Howgate, 5 B. and A. 220.

(*a*) Lowden v. Goodrick, Peake's N. P. C. 46. Pettit v. Addington, *ibid.* 62.

(*b*) *Per* Holt, C. J. Russell v. Corn, 6 Mod. 127. Cases *temp.* Holt, 699. Sippora v. Basset, 1 Sid. 225. Bull. N. P. 89.

(*c*) 2 Phill. Evid. 185, 6th edit. "Nothing can be given in evidence under the *alia enormia*, except acts which could not be put upon the record." *Per* Lord Kenyon. Lowden v. Goodrick, Peake's N. P. C. 46. Gilb. Evid. 237, 4th edit.

(*d*) Huxley v. Berg, 1 Stark. N. P. C. 98. "It is always the practice to give in evidence the circumstances which accompany and give a character to the trespass." *Per* Le Blanc, J. 2 M. and S. 79.

(*e*) *Per* Abbot, J. Sears v. Lyons, 2 Stark. N. P. C. 318. Merest v. Harvey, 1 Marsh. 139.

Of the declaration.

The trespass should be alleged to have been committed *vi et armis*, and *contra pacem regis*, though the only mode of taking advantage of the omission is by special demurrer (*a*), and in the Common Pleas, where the words are recited in the writ, though omitted in the declaration, it is sufficient. (*b*)

Of the plea.

General issue.

The general issue in trespass *quare clausum fregit*, is *Not guilty*, which puts in issue the plaintiff's possession of the premises at the time of the supposed trespass, and the fact of the trespass. Under this plea the defendant may give evidence of title, for although it is true, that even a wrongful possession is sufficient to maintain trespass (*c*), yet that is only as against a wrong doer. (*d*) The defendant therefore may shew that the soil and freehold was in himself, or that he held by a demise from the owner of the land, or that the plaintiff's interest in the premises, which he held under the defendant, had expired, at the time of the supposed trespass (*e*); or that the freehold and right of possession were in a third person, by whose command he entered. (*f*) So the defendant may shew, under the general issue, that he was tenant in common with the plaintiff, or that a third person, by whose command he entered, was tenant in common with the plaintiff. (*g*)

By statute 11 Geo. 2, c. 19, s. 21, in actions of trespass brought against any persons entitled to rents or services of any kind, their bailiff, or receiver, or other person, relating to any entry, by virtue of that act or otherwise, upon the premises

(*a*) 4 and 5 Anne, c. 16, s. 1.

(*b*) Com. Dig. Pleader, (3 M. 7,) (3 M. 8).

(*c*) *Ante*, p. 661. Defendant cannot give in evidence, that plaintiff had no *property*. Bull. N. P. 91.

(*d*) Taylor v. Eastwood, 1 East, 217.

(*e*) Dod v. Kyffin, 7 T. R. 354. Argent v. Durrant, 8 T. R. 403. Turner v. Meymott, 1 Bingh. 158.

(*f*) Dienly's case, 1 Leon. 301. Argent v. Durrant, 8 T. R. 403. Gilb. Evid. 255, 4th edit. The declarations of the owner, made after the trespass, are said to be inadmissible to prove the command. Garr v. Fletcher, 2 Stark. N. P. C. 71. This point was reserved by Holroyd, J. in Davies v. Lorimer, Lanc. Spring Ass. 1824; but the case went off on another point. See Hull v. Pickersgill, 1 B. and B. 282. As in *lib. ten.* the command is traversable, so under the general issue it must be proved. Ruled by Holroyd, J. in Davies v. Lorimer, Lanc. Spring Ass. 1824. And see Chambers v. Donaldson, 11 East, 74.

(*g*) Ross's case, 3 Leon. 83. Gilb. Evid. 235. 4th edit.

Of the plea.

General issue.

chargeable with such rents or services, or to any distress or seisure, sale or disposal, of any goods or chattels thereupon, the defendants may plead the general issue, and give the special matter in evidence. But a party distraining *off* the demised premises, is not entitled by this statute to give the special matter in evidence under the general issue. (*a*) Similar provisions are made with regard to actions of trespass against justices of the peace, mayors, constables, &c. by stat. 7 Jac. 1, c. 5, and with regard to actions against churchwardens and overseers, by stat. 21 Jac. 1, c. 12.

Where the defendant does not deny the possession to be in the plaintiff, but alleges a special ground of excuse, and admitting the trespass, avoids the effect of it by a justification, in such cases he must plead specially, and cannot give his matter of defence in evidence under the general issue. (*b*) Thus he must plead a right of common (*c*), a right of way, whether public or private, or any other easement (*d*), defect of fences (*e*), or a licence. (*f*) So the defendant must specially plead an entry by authority of law, as that the *locus in quo* was a common inn (*g*); that he entered to shew the sheriff the cattle upon replevin (*h*); or to view waste (*i*); or to remove a nuisance. (*k*) In short, every matter which excuses or justifies the trespass, must be specially pleaded. (*l*)

All matters, in discharge of the action, must also be pleaded specially, as a former recovery, a release, or accord and satisfaction. (*m*)

The defendant cannot prove under the general issue, that the plaintiff is jointenant, or tenant in common of the premises in question with another person, for such matter ought to be pleaded in abatement (*n*); though where one tenant in common brings

(*a*) Vaughan v. Davis, 1 Esp. N. P. C. 357. Furneaux v. Fotherby, 4 Campb. N. P. C. 136.

(*b*) Co. Litt. 282, b. Vin. Ab. Evid. (O. b. 1).

(*c*) Br. Ab. Gen. Issue, 53. Co. Litt. 283, a.

(*d*) Vin. Ab. Evidence, (Z. a). Gilb. Evid. 251, 4th edit. Hawkins v. Welles, 2 Wils. 173.

(*e*) Co. Litt. 283, a.

(*f*) Gilb. Evid. 249, 4th edit.

(*g*) Com. Dig. Pleader, (3 M. 35).

(*h*) 2 Rol. Ab. 553, l. 12.

(*i*) Com. Dig. Pleader, (3 M. 35).

(*k*) Com. Dig. Pleader, (3 M. 37).

(*l*) See *post*, the various matters which may be pleaded.

(*m*) Bird v. Randall, 3 Burr. 1353.

(*n*) Brown v. Hedges, 1 Salk. 290. Bull. N. P. 91. Gilb. Evid. 234, 4th edit. Trials *per pais*, 541, 552.

trespass against his cotenant, the cotenancy may be given in evidence under the general issue. (*a*) Of the plea.

If the plaintiff declares generally against the defendant, for breaking and entering his close in A., without naming the close, the defendant may plead *liberum tenementum*, or the common bar, viz. that the close is his soil and freehold, or the soil and freehold of a third person, by whose command he entered (*b*), which may have the effect of compelling the plaintiff to new assign, and to ascertain the close with exactness and precision, either by its name or abuttals; for if the plaintiff should take issue on such plea, it would be sufficient for the defendant to prove a freehold in himself any where in A., which would entitle him to a verdict. (*c*) There are three modes of pleading this plea. 1. By naming a wrong place in the vill, e. g. *Broomfield*, and then (whether truly or not is immaterial) alleging that such place is the soil and freehold of the defendant. In this case, as the plaintiff cannot entitle himself to Broomfield, or prove a trespass committed in it, he must necessarily new assign. (*d*) 2. By pleading generally that the *locus* is the soil and freehold of the defendant; and 3dly, that the *locus* is an acre of land, or a house, which is the soil and freehold of the defendant. The two latter pleas do not necessarily induce a new assignment, for if the defendant has not any freehold in the vill, the plaintiff may traverse them with safety. (*e*) So if the defendant pleads that the *locus in quo* is called by such a name, and that it is his freehold (mentioning the very name of the place where the trespass was committed) the plaintiff must traverse the plea, and not new assign, for the parties are then agreed as to the place; but if he derives title under the defendant, as by a lease for years, or states a title not inconsistent with the defendant's, he must neither traverse the plea nor new assign, but admitting the freehold to be in the defendant, must insist on his own title, and then the traverse must come on the part of the defendant. (*f*) Of Lib. Ten.

(*a*) Gilb. Evid. 235, 4th edit.

(*b*) The command is traversable. Chambers v. Donaldson, 11 East, 65.

(*c*) Helwis v. Lambe, 2 Salk. 453. Goodright v. Rich, 7 T. R. 335. Hawke v. Bacon, 2 Taunt. 156. 1 Saund. 299, b. note, 5th edit.

(*d*) Martin v. Kesterton, 2 W. Blacks. 1090.

(*e*) See Selw. *Nisi Prius*, 1232, 4th edit. where the history of this plea is well detailed.

(*f*) Lambert v. Stroother, Willes, 223, 225. See *post*, as to the replication and new assignment.

Of the plea.

Of Lib. Ten.

Such is the mode of pleading, where the plaintiff gives no name to the close in the declaration; but by a rule, both of the King's Bench(*a*) and Common Pleas (*b*), the declaration upon an original *quare clausum fregit*, may mention the place certainly, and so prevent the use and necessity of the common bar. Therefore when the plaintiff names the real name of the close in his declaration, and the defendant pleads *liberum tenementum*, generally, without setting out the abuttals of the close, the plaintiff need not new assign, but, having traversed the plea, may recover on proving a trespass done to a close in his possession, bearing the name stated in the declaration, although the defendant may have a close in the same parish, known by the same name. (*c*)

Since the cases, which have determined that the defendant may give evidence of title in himself or another, under the general issue (*d*), the plea of *liberum tenementum* has fallen into disuse, though it may still be adopted whenever it is desirable to confine the plaintiff to the proof of a trespass in a close specially described. (*e*) The plaintiff may always avoid the delay, incurred by a new assignment, on the plea of *liberum tenementum*, by describing the *locus in quo* with accuracy and precision in the declaration.

Of right of common.

In a declaration for disturbing the plaintiff, in the exercise of his right of common, it has been shown that it is not necessary for him to set out any title to the common, and that he may state that he was possessed of certain land, by reason whereof he has a right of common. (*f*) But in a plea justifying under a right of common, the defendant must set out his title to the common specially, as in a plea of common appurtenant, by shewing a seisin in fee of the land, in respect of which he claims a right of common, either in himself or some other, under whom he derives title, and then prescribing in a *que estate*. (*g*)

Where a copyholder claims common or other profit *in alieno*

(*a*) Rule K. B. M. 1654, s. 12.
(*b*) Rule C. P. M. 1654, s. 16.
(*c*) Cocker v. Crompton, 1 B. and C. 489.
(*d*) *Ante*, p. 663.
(*e*) See Stevens v. Whistler, 11 East, 51.
(*f*) *Ante*, p. 377.
(*g*) Grimstead v. Marlowe, 4 T. R. 718. Stringer's case, Cro. Car. 599. 1 Saund. 346, notes, 5th edit.

Of the plea.

Of right of common.

solo, he must not claim it by custom (*a*), but must prescribe for it in the name of the lord. (*b*) Where the copyholder claims common or other profit in the *lord's soil*, he cannot prescribe for it in his own name, on account of the weakness of his estate; nor in the lord's name, for the lord cannot prescribe for common or other profit in his own soil; the copyholder, therefore, must entitle himself to it by way of custom within the manor. (*c*)

As an interest or profit *à prendre* in another man's soil cannot be claimed by custom (unless in the abovementioned case of a copyholder claiming it in the lord's soil) a custom that every *tenant, inhabitant*, or *occupier* of any message within a borough, has been used to have common, is bad, but the inhabitant should either prescribe in the corporation of the borough, if such a prescription can be sustained by the evidence, or else in his own name, that he and all those whose estate he has in a house in the borough have been used to have common. (*d*)

If there be any reason to apprehend that a prescriptive right of common has been extinguished by unity of possession, it is proper to add a plea, claiming the common by non-existing grant. In such plea it is necessary to state the date of the grant, and the names of the parties (*e*), but *profert* is excused, if it be averred that the deed has been lost by time and accident. (*f*)

Statement of the prescription.

Where a prescription is alleged in bar it is an entire thing, and must be proved as laid. (*g*) But the proof of a larger prescription than that alleged will not be a variance. Thus, where a person prescribed for a right of common for one hundred sheep, and the jury found a right for one hundred sheep *and six cows*, the prescription was held to be proved. (*h*) So in a prescription for common of pasture for sheep *levant* and *couchant*, the jury returned a special verdict, that the right of common extended to all other cattle *levant* and *couchant* on the tenement, as well as

(*a*) Grimstead v. Marlow, 4 T. R. 717.

(*b*) Barwick v. Matthews, 5 Taunt. 368. 1 Marsh. 50, S. C.

(*c*) Foison v. Crachroode, 4 Rep. 31, b. Gateward's case, 6 Rep. 60, b. Pearce v. Bacon, Cro. Eliz. 390. 1 Saund. 349, notes, 5th edit. Com. Dig. Copyh. (K. 6).

(*d*) Mellor v. Spateman, 1 Saund. 340, b. and the notes. Gateward's case, 6 Rep. 59, b. Grimstead v. Marlowe, 4 T. R. 717.

(*e*) Hendy v. Stephenson, 10 East, 55.

(*f*) Read v. Brookman, 3 T. R. 151.

(*g*) *Per* Holroyd, J. Ricketts v. Salwey, 2 B. and A. 366.

(*h*) Bushwood v. Pond, Cro. Eliz. 722. Johnson v. Thoroughgood, 1 Brownl. 177. Hob. 64, S. C.

Of the plea.

Of right of common.

to sheep, and the court held that the prescription was not falsified by the verdict. (*a*)

But the defendant must prove a prescription as ample as that alleged, and therefore, where the defendant prescribed for a right of common in five hundred acres, and it was found by verdict that the ancestor had released the common in five of those acres, the court held that the defendant had failed in his prescription. (*b*) So on a prescription for all commonable cattle, evidence of common for sheep and horses only will not maintain the issue. (*c*) So where the defendant prescribed for common for all cattle, &c. at all times of the year, and it appeared in evidence that sheep were excepted for a certain time in the year, the court held the prescription not to be proved, and said, that it ought to have been pleaded specially with this exception. (*d*) And where a man has an acre of freehold in a great field, to which common belongs, he cannot prescribe for such common in the whole field, but in such a part of the field, because otherwise the prescription would extend to his own land, in which he cannot have common. (*e*)

Of right of way.

Title, how shewn.

In pleading a right of way, the defendant must state a title to the way, either by actual (*f*), or implied grant (*g*), by prescription (*h*), by custom (*i*), or by express reservation. (*k*)

By grant.

In pleading a right of way by actual grant, it must be stated according to the terms of such grant; and as twenty years adverse unexplained user of a right of way is evidence of a grant (*l*) a right of way by non-existing grant may in such case be pleaded, but the names of the parties to such supposed grant must be stated. (*m*) Where it is possible that a prescriptive right of way has been extinguished by unity of possession, and the circum-

(*a*) Bruges v. Searle, Carth. 219. 1 Shower, 347. 4 Mod. 89, S. C. See the Bailiffs of Tewksbury v. Bricknell, 1 Taunt. 142.

(*b*) Rotheram v. Green, Noy, 67.

(*c*) Pring v. Henley, Bull. N. P. 59; and see Lovelace v. Reignolds, Cro. Eliz. 563. Rogers v. Allen, 1 Campb. N. P. C. 313. Coney v. Verden, Selw. N. P. 414, 4th edit. Brook v. Willet, 2 H. Bl. 224. Vin. Ab. Prescription, (W).

(*d*) R. v. Inhab. of Hermitage, Carth. 241. See 2 H. Bl. 234.

(*e*) Conyers v. Jackson, Clayt. 19. Freeman, 210. Vin. Ab. Prescription, (Y). pl. 23. See Cheesman v. Hardham, 1 B. and A. 706.

(*f*) *Ante*, p. 362.

(*g*) *Ante*, p. 363.

(*h*) *Ante*, p. 365.

(*i*) *Ibid.*

(*k*) *Ibid.*

(*l*) *Ante*, pp. 362, 371.

(*m*) Hendy v. Stephenson, 10 East, 55.

stances will support a plea of right of way by non-existing grant, such plea should be added. Of the plea.

Of right of way. *By implied grant.*

In pleading a right of way by necessity (or rather by implied grant (*a*), the defendant must state his title as it really is, and in what manner it arises (*b*); but where the origin of a way of necessity can be no longer traced, but it has been used without interruption, it must be pleaded as a way either by grant or prescription. (*c*)

By prescription

In pleading a right of way by prescription (*d*), as well as a right of common (*e*), the prescription must be proved as laid, but proving more does not vitiate the prescription. Thus where the prescription stated was for a way for the inhabitants of Water Eaton, but the prescription proved was for the inhabitants of Water Eaton *and other towns*, Probyn, J. held that the plea was not vitiated. (*f*) But the defendant must prove a prescription as large as that stated in his plea; thus in an action on the case, for disturbance of way, it was held that a claim of a prescriptive right of way from A. over the defendant's close into D. is not supported if it appear that a close called C., over which the way once led, and which adjoins to D., was formerly possessed by the owner of close A., and was by him conveyed in fee to another, without reserving the right of way, for thereby it appears that the prescriptive right of way does not, as claimed, extend *unto* D. but stops short at C. (*g*) In this case Lord Kenyon said, that the plaintiff might perhaps still have a prescriptive right of way *towards*, but certainly not *unto*, the *terminus*. (*h*) Where the defendant in trespass *quare clausum fregit* in his plea prescribed for an occupation way from his own close, "unto, through, and over the said several closes, in which, &c." to and unto a certain highway, &c. and from thence back again unto the said close of the defendant; and it appeared at the trial that one of the several intervening closes was in the possession of the defendant himself, Lord Kenyon thought that the prescription was negatived, and the plaintiff had a verdict, but on

(*a*) *Ante*, p. 363.

(*b*) Dutton v. Taylor, 2 Lutw. 1487. Bullard v. Harrison, 4 M. and S. 387. 1 Saund. 323, a. note, 5th edit.

(*c*) 1 Saund. 323, a. note, 5th edit.

(*d*) *Ante*, p. 365.

(*e*) *Ante*, p. 368.

(*f*) Fountain v. Cook, Selw. N. P. 1244, 4th edit.

(*g*) Wright v. Rattray, 1 East, 377.

(*h*) But *quære*, whether such prescriptive claim would not be destroyed by shewing, that close C. was once in the possession of the owner of close A., and that before that time, the way extended *unto* the *terminus*.

Of the plea.

Of right of way.

application to the court of Common Pleas a new trial was granted. (*a*) If a man has a right of way from his house to the church, and the close next to his house, over which the way leads, is his own, it is said by Dodderidge, J. that he cannot prescribe that he has a right of way from his *house* to the church, because he cannot prescribe for right of way over his own land, but Ley, C. J. and Chamberlain, J. *contra*, for then all ways over common fields would be destroyed; and they said that a general prescription applied only to the lands of others. Dodderidge, J. observed, that it might be otherwise where the way was indefinite. (*b*) If a right of way be qualified, it must be described accordingly. (*c*)

By custom.

Where a copyholder claims a right of way over his lord's soil, he cannot prescribe for it, either in his own name on account of the weakness of his estate, or in his lord's, for the latter cannot have an easement in his own soil. (*d*)

How the way must be described.

The particular kind of way must be stated in the plea, whether a foot-way, a horse-way, or a carriage-way, otherwise it will be bad on demurrer (*e*); but in pleading a right of way, there is a distinction between a public way and a private way; in pleading the former, it is not necessary to set out the *terminus à quo* or *ad quem* (*f*), which is requisite in pleading the latter. (*g*) So in pleading the former it is sufficient to allege that it is a common public highway, without shewing how it became so, or that it has been so from time immemorial. (*h*)

It has been asserted that a right of way ought not to be pleaded as appendant or appurtenant, because it is not an interest, but an easement only. (*i*) This, however, appears to be incorrect, for unless a right of way could be appendant or appurtenant to land, it could not be claimed by prescription in a *que estate*. (*k*)

(*a*) Jackson v. Shillito, cited 1 East, 381.

(*b*) Slaman v. West, Palm. 387. 2 Roll. Rep. 397, S. C. Lord Kenyon appears to have inclined to the opinion of Dodderidge. Wright v. Rattray, 1 East, 582.

(*c*) See R. v. Marquis of Buckingham, 4 Campb. N. P. C. 189.

(*d*) S. P. as to Common, 4 Rep. 31, b. 6 Rep. 60, b. 1 Saund. 349, notes, 5th edit. *Ante*, p. 667.

(*e*) Alban v. Brownsall, Yelv. 163. 1 Brownl. 215, S. C.

(*f*) Rouse v. Bardin, 1 H. Bl. 351.

(*g*) *Ibid.* Alban v. Brownsall, Yelv. 163. Vin. Ab. Chimin private, (H). pl. 14.

(*h*) Aspindall v. Brown, 3 T. R. 265.

(*i*) Godley v. Frith, Yelv. 159. Com. Dig. Chimin, (D. 2). See Anon. Hard. 407.

(*k*) Litt. s. 183. See Plowd. 170. Morris v. Edgington, 3 Taunt. 30. Whalley v. Tompson, 1 Bos. and Pul. 375.

To trespass *quare clausum fregit* the defendant may plead, that the plaintiff is bound to repair the fences between the closes of plaintiff and defendant, and that for want of such repair his cattle escaped and did the damage alleged. (*a*) But, if the plaintiff gives the defendant notice that the cattle are upon his land, and the defendant suffers them to continue there after such notice, the cattle are then trespassers (*b*), for the owner may justify an entry into the plaintiff's lands in order to retake the beasts. (*c*) If lands be open to the highway, and the beasts of a stranger enter upon the land, it is a trespass (*d*), but, if the cattle, in passing on the highway, eat herbs or corn *raptim et sparsim*, against the will of the owner, this is no trespass. (*e*) Where two persons are possessed of adjoining closes, neither being under any obligation to fence, each is bound to prevent his cattle from trespassing on the land of the other. (*f*) If A. is bound to enclose against B., and B. against C., and C.'s cattle escape out of his land into B.'s land, and remain there after notice from B., and afterwards escape into the land of A., through defect of A.'s fences, in this case A. may, as it seems, maintain trespass against C., for A. was only bound to fence against cattle being lawfully in the close of B. (*g*)

Of the plea.

Of defect of fences.

It is sufficient for the defendant to say that he is *possessed* of a close adjoining to the plaintiff's close, without saying for what term or by what title (*h*), though, if the defendant allege a precise estate in fee, he gives the plaintiff an opportunity of traversing it. (*i*)

It was once thought that it was not sufficient to state in general terms, that the plaintiff ought to repair, without shewing by what title, whether by prescription or otherwise (*k*), but, under the distinction which has been since taken, between cases where a party lays a charge upon the right of another, and where he pre-

(*a*) Com. Dig. Pleader, (3 M. 29). 2 Rol. Ab. 565, l. 30. Vin. Ab. Fences.

(*b*) Edwards v. Halinder, 2 Leon. 93. Kimp v. Cruwes, 2 Lutw. 1578. 2 Saund. 285, note. Com. Dig. Pleader, (3 M. 29).

(*c*) 2 Rol. Ab. 565, l. 34.

(*d*) 2 Rol. Ab. 565, l. 47.

(*e*) Com. Dig. Trespass, (D). 2 Rol. Ab. 567, l. 55.

(*f*) Churchill v. Evans, 1 Taunt. 529. Dyer, 372, b. Tenant v. Golding, 6 Mod. 314.

(*g*) Dyer, 365, b. Dovaston v. Payne, 2 H. Bl. 528. Anon. 3 Wils. 126, *quere* where no notice has been given, F. N. B. 128, note (a). Right v. Bayard, 1 Freem. 379. 3 Keb. 388, 417.

(*h*) Com. Dig. Pleader, (3 M. 29). Faldo v. Ridge, Yelv. 75.

(*i*) Dyer, 365, a. F. N. B. 128, note (a).

(*k*) Faldo v. Ridge, Yelv. 74. Com. Dig. Pleader, (3 M. 29).

Of the plea.

Of defect of fences.

scribes himself in right of his own estate (*a*), it seems, that it is sufficient to state generally that the plaintiff ought to repair the fences. (*b*)

Under legal process.

The defendant may justify in an action of trespass *quare clausum fregit*, by pleading an entry to execute process (*c*), and when the defendant justifies under a writ, warrant, precept, or any other authority whatever, he must set it forth particularly in his plea, for it is not sufficient to allege generally that he committed the act complained of *by virtue of a certain writ, or other warrant* directed to him, but he must set it forth specially, and shew that he has pursued the authority in substance and effect. (*d*) There is a distinction in pleading a justification under process, between the party or a stranger, and the officer. The party in the cause, or a stranger, must set forth the *judgment* as well as the *writ* in the plea (*e*), but the officer need only shew the writ and warrant (*f*), for he is bound at all events to execute the process of the court. Where the party to the cause and the officer join in the plea, it must contain a justification sufficient for both, and must, therefore, set out the judgment, or it will be bad. (*g*) If an officer justify under *mesne* process, which he ought to return, and all *mesne* process ought to be returned, he must shew a return in his plea (*h*), but there is said to be a difference between the principal officer, to whom the writ is directed, and a subordinate officer, for the former shall not justify under the process, unless he has obeyed the order of the court in returning it, while it is otherwise with regard to the latter, who has not the power to procure a return to be made. (*i*) Where an officer justifies under final process, he need not shew a return, unless some ulterior process is to be resorted to, in order to complete

(*a*) Rider v. Smith, 3 T. R. 766.

(*b*) See Lib. Plac. 304. 9 Wentw. 58.

(*c*) Com. Dig. Pleader, (3 M. 42) (3 M. 24).

(*d*) Co. Litt. 282, b. Matthews v. Carey, 3 Mod. 137. 1 Salk. 107. 1 Shower, 61, S. C. Com. Dig. Pleader, (E. 17). 1 Saund. 297, note, 5th edit.

(*e*) Briton v. Cole, Carth. 443. 1 Salk. 408, S. C. Com. Dig. Pleader, (3 M. 24).

(*f*) Turner v. Felgate, 1 Lev. 95. Cotes v. Michill, 3 Lev. 20; and so as it seems a person acting in his aid. Grant v. Bagge, 3 East, 133. Breton v. Cole, 1 Salk. 409.

(*g*) Philips v. Biron, 1 Str. 509. Smith v. Bouchier, 2 Str. 994. Middleton v. Price, 2 Str. 1184.

(*h*) Middleton v. Price, 2 Str. 1184. Rowland v. Veale, Cowp. 20.

(*i*) Freeman v. Blewitt, 1 Ld. Raym. 633. 1 Salk. 409, S. C. 2 Rol. Ab. 563, l. 25. Cowp. 21.

Of the plea.

Under legal process.

the justification, in which case it may be necessary to shew to the court the return of the prior writ, to warrant the issuing of the other. (*a*)

In justifying under the process of an inferior court considerable strictness is required, 1. The jurisdiction of the inferior court must be stated, even where the plea is pleaded by an officer of the court. (*b*) 2. It must appear, where the plea is pleaded by the party, or by a stranger, that the cause of action below arose within the jurisdiction of the inferior court, though it seems not to be necessary for the officers of the court below to make this averment, because they are punishable if they do not obey the process of the court. (*c*) Merely stating in the plea the declaration in the court below, which contained an averment, that the cause of action arose within the jurisdiction, is not sufficient, for such averment is not traversable (*d*); but it is not necessary to set forth the cause of action. (*e*) 3. Formerly it was held to be necessary to set forth the proceedings of the inferior court at length (*f*), but now they may be set out shortly with a *taliter processum est.* (*g*) In justifying under a *capias ad respondendum*, a precedent summons ought to be shewn, for a *capias* in the first instance without a summons is illegal. (*h*) However, when it appears that the plaint was levied at one court, and that such proceedings were thereupon had, that the *capias* issued at a subsequent court, it will be intended on demurrer, that the proceedings were regular, though no summons be stated (*i*); but such intendment cannot be made where it is stated that the *capias* issued at the same court at which the plaint was levied. (*k*)

In justifying an entry into a dwelling-house by virtue of legal process, in a civil suit, there is a distinction between entering the house of the party against whom the process has issued, and that of a stranger, and between the breaking of an outer door and of an inner door.

(*a*) Hoe's case, 5 Rep. 90. Rowland v. Veale, Cowp. 18. Chesaley v. Barnes, 10 East, 73.

(*b*) Moravia v. Sloper, Willes, 37. Morse v. James, Willes, 128.

(*c*) Moravia v. Sloper, Willes, 34, 37. Evans v. Munckley, 4 Taunt. 50.

(*d*) Adney v. Vernon, 3 Lev. 243. See 2 Bing. 218.

(*e*) Rowland v. Veale, Cowp. 18.

(*f*) Com. Dig. Pleader, (E. 18). Cowp. 19.

(*g*) Rowland v. Veal, Cowp. 18. Doe v. Parmiter, 2 Lev. 81. Murray v. Wilson, 1 Wils. 317. 1 Saund. 92, notes; but see Morse v. James, Willes, 128.

(*h*) Marpole v. Basnett, Willes, 38, note (a). 1 Saund. 90, notes, 5th edit.

(*i*) Titley v. Foxall, Willes, 688.

(*k*) Marpole v. Basnett, Willes, 38, n. (a) 1 Saund. *ubi sup.*

Of the plea.

Under legal process.

With regard to the house of the party against whom the process has issued, the justification of the officer does not depend upon his finding or not finding the defendant's goods there, for the most probable place to find the goods of the defendant is the house in which he dwells (*a*); and for the same reason the sheriff may justify under a *fi. fa.* against the goods of an intestate in the hands of his administratrix, or of her and her husband, an entry into the house of the husband (the outer door being open) to search for the goods, though none be found therein. (*b*) So also bail above may justify the breaking and entering of the house of a person in which their principal resides, (the outer door being open) in order to search for the principal for the purpose of rendering him. (*c*) The officer cannot, however, justify breaking open the outer door or window of the house of the party against whom the process issues (*d*), and, if the outer door is open, and he enters into the house, he cannot justify breaking open the inner doors without making a previous demand (*e*), unless the goods or the defendant be in the inner room, in which case no demand appears to be necessary. (*f*)

But, in entering the house of a stranger, the sheriff's justification depends on the fact of the goods or the person against whom the process is directed being found there. (*g*) If the sheriff has entered the house of a stranger (the outer door being open) he may justify breaking open the inner doors, provided the goods or the person against whom the process has issued be in the inner room (*h*), but he cannot justify the breaking open of the inner doors of a stranger's house without request made, upon suspicion that the party against whom the process is directed is within. (*i*) With regard to the outer door of a stranger's house, there is a distinction between it and the outer door of the

(*a*) *Per* Gibbs, C. J. Cooke v. Birt, 5 Taunt. 769. Ratcliffe v. Burton, 3 Bos. and Pul. 228; but see Johnson v. Leigh, 1 Marsh. 567.

(*b*) *Ibid.* 1 Marsh. 333, S. C.

(*c*) Sheers v. Brooks, 2 H. Bl. 120.

(*d*) Foster's Discourse of Homicide, c. 8. s. 19. Lee v. Gansell, Cowp. 1. But after entering by the outer door he may afterwards break open a window. Lloyd v. Sandilands, 8 Taunt. 251.

(*e*) Ratcliffe v. Burton, 3 Bos. and Pul. 223.

(*f*) Hutchinson v. Birch, 4 Taunt. 625. 3 Bos. and Pul. 229.

(*g*) Cooke v. Birt, 5 Taunt. 770. 2 Lutw. 1434. Com. Dig. Execution, (C. 5).

(*h*) Hutchinson v. Birch, 4 Taunt. 619. 6 Taunt. 248.

(*i*) Johnson v. Leigh, 6 Taunt. 246. 1 Marsh. 565, S. C.

defendant's own house, for where the party against whom the process has issued takes refuge in the house of another, or his goods are conveyed into such house, in such cases, *after denial on request made*, the sheriff may break into the house, for the privilege as to the outer door extends only to the owner of the house and his family, and to his proper goods. (*a*)

Of the plea.

Under legal process.

In the case of a misdemeanor, a person cannot justify breaking open the outer door of the dwelling house of the party charged with the misdemeanor, without a previous demand of admittance. (*b*)

A., an excise officer, applied to the commissioners of excise for a warrant to search the house of B. The commissioners, being satisfied with the reasonableness of his suspicions, granted a warrant, empowering A. to enter the house of B., and seise all the run tea which should be there found fraudulently concealed. A. accordingly entered B.'s house in the daytime, and broke open a lock which B. had refused to open, and rummaged his goods, but did not find any tea. In an action of trespass brought by B. against the officer, it was held, that upon the true construction of the statute 10 Geo. 1, c. 10, s. 13, the officer was justified, although there was not any tea found, or any evidence given of the grounds of his suspicion. (*c*)

Of licence.

If the defendant has committed the act complained of by the licence of the plaintiff, either in fact or in law, such licence must be specially pleaded (*d*), and so if the plaintiff relies upon a licence in answer to the defendant's plea, it must be specially replied. (*e*)

How a licence may be created.

A licence, being an easement merely, and not an interest in land, is not within the statute of frauds, and needs not to be in writing. (*f*) It may be presumed, as where an enclosure having been made from a waste twelve or thirteen years, and seen by the steward of the same lord from time to time without objection made, it was left to the jury to say whether or not the inclosure was made by the lord's licence. (*g*) So where A. suffers B. to build a nuisance

(*a*) Semayne's case, 5 Rep. 93, a. 2 Hale, P. C. 117. 3 Bos. & Pul. 230.

(*b*) Launock v. Brown, 2 B. and A. 592.

(*c*) Cooper v. Booth, K. B. on error from C. P. 3 Esp. N. P. C. 135, overruling Bostock v. Saunders, 2 W. Bl. 912. 3 Wils. 434.

(*d*) Bennett v. Allcott, 2 T. R. 166. Hawkins v. Wallis, 2 Wils. 173.

(*e*) Taylor v. Smith, 7 Taunt. 156.

(*f*) *Ante*, p. 395.

(*g*) Doe d. Foley v. Wilson, 11 East, 56. See Doe d. Jackson v. Wilkinson, 3 B. and C. 413.

Of the plea.

Of licence.

on his (A.'s) land, it shall be presumed to be done with A.'s licence and consent, and therefore A. shall not, it is said, abate it. (*a*) The keeping open of the doors of a house, in which there is a public billiard-room, is a licence in fact to all persons to enter for the purpose of playing. (*b*)

By whom.

A licence by a servant is no plea (*c*), nor by a wife (*d*), nor by a daughter. (*e*)

To what it extends.

A licence includes as incident to it, a power to do every thing, without which the act licenced cannot be done. Thus, if A. licences B. to enter his house to sell goods, B. may take assistants, if necessary, for the purpose of selling the goods, and, if it be pleaded, that B., and also C. and D., his servants, and by his command, entered for that purpose, and necessarily continued there for so long, it will be intended, that it was necessary for them all to enter. (*f*) So a licence to lay pipes in another's land to convey water, includes as incident to the licence, a right to enter and dig the ground in order to repair the pipes, although such power is not expressly given. (*g*)

There is said to be a distinction between a licence for pleasure and for profit, the former is said to be merely personal, while the latter entitles the party to take other persons along with him. (*h*) A licence to one to hunt and carry away deer is a licence as to the hunting and killing, and a grant as to the carrying away. (*i*) A licence to hunt does not give a right to shoot. (*k*) An authority from a tenant to his landlord, in the absence of the former to let the premises, does not justify the landlord in entering the premises (the key being lost) through a window by means of a ladder, in order to shew the house. (*l*)

(*a*) Said to be ruled by Lord Mansfield, 1 Morg. Vade Mec. 297, *semble* S. C. *per* Lawrence, J. 6 T. R. 556. As to such a licence being countermandable, *vide post*.

(*b*) Ditcham v. Bond, 3 Campb. N. P. C. 525.

(*c*) Holdringshaw v. Rag, Cro. Eliz. 876. Owen, 114, S. C.

(*d*) Tayler v. Fisher, Cro. Eliz. 245.

(*e*) Cock v. Wortham, Selw. N. P. 1040, 4th edit.

(*f*) Dennet v. Grover, Willes, 195.

(*g*) Br. Ab. Incidents, 8. Guy v. Brown, Moor, 644. Vin. Ab. Incidents. 1 Saund. 233, (notes) 5th edit.

(*h*) Br. Ab. Licence, 10. Tresp. 287, 434. Webb v. Paternoster, Palm. 73. Willes, 197, note (*a*). Finch's Law, 8, b. Vin. Ab. Licence, (D). 9 Rep. 49, b. Com. Dig. Chase, (H. 2.)

(*i*) Thomas v. Sorrell, Vaugh. 351, see

(*k*) Moore v. Lord Plymouth, 7 Taunt. 614. 1 B. Moore, 346, S. C.

(*l*) Ancaster v. Milling, 2 D. and R. 714.

Of the plea.

Of licence: *Abuse of licence.*

A licence to enter and occupy land, for a time certain, amounts to a lease, and ought, as it seems, to be so pleaded. (*a*)

The distinction between a licence in fact and a licence in law, the abuse of the last of which renders the party a trespasser *ab initio*, has been already noticed. (*b*)

When assignable.

A mere licence, which conveys no interest, is personal to the grantor, and cannot be assigned (*c*), but, where it is coupled with an interest, it is said to be assignable. (*d*)

When countermandable.

A licence executory may, it is said, be countermanded, while it is otherwise with regard to a licence executed (*e*), and, according to this doctrine, it was held by Lord Ellenborough, in a late case, that a licence to erect a skylight, having been acted upon, and expense having been incurred, such licence could not be recalled, at least, without putting the party in the same situation as before, by paying the expenses incurred in consequence of it. (*f*) However, in a later case, it was held, that the licence from the lord of a manor to erect a cottage on a piece of land, part of the waste, rendering an annual rent of 10*s.* 6*d.* as a quit rent, was a mere personal licence, and might be recalled immediately. (*g*) If a certain time is limited, a licence, it is said, is not revocable (*h*), and a distinction is taken between a licence giving an interest, which cannot be countermanded, and a licence giving an authority only, which may be countermanded. (*i*)

By law.

There are many cases in which the law licences a man to enter upon the land of another. Thus a reversioner may justify an entry upon the land demised for the purpose of viewing waste (*k*), or for the purpose of distraining (*l*), or as it seems of repairing. (*m*)

(*a*) Br. Ab. Licence, 19. Hall v. Seabright, 1 Mod. 14. 1 Sid. 428, S. C. Right d. Green v. Proctor, 4 Burr. 2209.

(*b*) *Ante*, p. 667.

(*c*) Bringloe v. Morrice, 1 Mod. 210. See Manw. F. L. 278. Com. Dig. Chase, (H. 2).

(*d*) Warren v. Arthur, 2 Mod. 317.

(*e*) *Per* Houghton, Webb v. Paternoster, Palm. 74. 2 Rol. Rep. 152.

(*f*) Winter v. Brockwell, 8 East, 308.

(*g*) R. v. Horndon on the Hill, 4 M. and S. 562. R. v. Hagworthingham, 1 B. and C. 634, S. P.; but see R. v. Inhabitants of Standon, 2 M. and S. 467.

(*h*) Jenk. Cent. 209. Dyer, 177. Webb v. Paternoster, Poph. 151.

(*i*) *Arg.* Lane, 5. Vin. Ab. Licence, (E). pl. 1. Tayler v. Waters, 7 Taunt. 384. 2 Marsh. 560, S. C. Doe v. Wood, 2 B and A. 738. Strictly speaking, a licence never conveys an interest, but is merely an excuse for a trespass. Vaugh. 351. If any interest passes, it operates as a grant, lease, &c. according to the nature of the subject matter, and cannot therefore be revocable. *Ibid.* and see *supra*.

(*k*) 2 Rol. Ab. 586, l. 5.

(*l*) Com. Dig. Pleader, (3 M. 42, 25).

(*m*) Com. Dig. Pleader, (3 M. 42). See Colley v. Streeton, 3 D. and R.

Of the plea.

Of licence.

So a man may justify an entry upon land, in order to remove a nuisance (*a*); and a reversioner may justify using a way over the demised premises during the tenancy, to remove an obstruction. (*b*) So where a man leases, reserving the trees, he may enter to shew them to a purchaser; or where he has a right to wreck thrown on another's land, he may enter to take it. (*c*) The lord of a manor has no right given him by the law to enter upon the copyholds within his manor, under which there are mines and veins of coal, to bore for the same. (*d*)

Where a trespasser puts the goods, which he has tortiously taken, upon his own land, the owner may enter to take them. (*e*) So the vendee of goods may justify an entry to take them (*f*), and if a man has goods upon the land of another, and dies, his executor may enter and take them. (*g*) So a creditor may justify an entry into the house of his debtor to demand his debt, provided the debtor be within at the time. (*h*)

There are some cases in which the law licences one man to enter the land of another for reasons of public policy; as to make a bulwark in defence of the king and kingdom (*i*), to pull down a house in order to save others from fire (*k*), or to kill noxious animals, as a fox. (*l*)

When the plaintiff complains of several trespasses committed on several days, and the defendant pleads a licence, to which the plaintiff replies *de injuriâ suâ propriâ absque tali causâ*, the defendant must shew a licence for each act of trespass proved by the plaintiff; in such case it is not necessary for the plaintiff to new assign, for the meaning of the replication is, that the defendant committed the several trespasses without a licence for each. (*m*)

532, and Neale v. Wyllie, 3 B. and C. 535, whether a lessee, who is bound to repair, and underlets, may enter for the purpose of repairing.

(*a*) Com. Dig. Pleader, (3 M. 42). R. v. Rosewell, 2 Salk. 459.

(*b*) Proud v. Hollis, 1 B. and C. 8, 2 D. and R. 31, S. C.

(*c*) *Ante*, p. 363.

(*d*) Bourne v. Taylor, 10 East, 189, S. P. as to trees, Whitechurch v. Holworthy, 4 M. and S. 341.

(*e*) 2 Rol. Ab. 565. Higgins v. Andrews, 2 Rol. Rep. 56. Com. Dig. Pleader, (3 M. 39).

(*f*) 2 Rol. Ab. 567, l. 40.

(*g*) 2 Rol. Ab. 564, l. 25.

(*h*) Holdringshaw v. Rag, Cro. Eliz. 876. Owen, 114, S. C. Com. Dig. Pleader, (3 M. 39).

(*i*) Com. Dig. Pleader, (3 M. 37).

(*k*) *Ibid.*

(*l*) Millen v. Fandry, Poph. 163. Gundry v. Feltham, 1 T. R. 334.

(*m*) Barnes v. Hunt, 11 East, 451.

Of the plea.

Of accord and satisfaction.

Accord and satisfaction is a good plea in trespass (*a*), but a plea of accord without satisfaction is not good (*b*), and a plea that the plaintiff and defendant agreed to settle all matters in dispute, and to bind themselves in a penalty not to sue each other, is a bad plea. (*c*)

Of arbitrament.

Arbitrament also is a good plea in this action. (*d*)

Of release.

The defendant may also plead a release (*e*), and if there are several defendants, a release from the plaintiff to one of them is a discharge of all. (*f*)

Of the statute of limitations.

By the statute of limitations, 21 Jac. 1, c. 16, s. 3, actions for trespass *quare clausum fregit* must be brought within six years next after the cause of such action or suit. Evidence of a promise to make compensation is not sufficient, upon issue joined on the plea of *actio non accrevit infra sex annos*. (*g*)

Of estoppel.

If a verdict be found on any fact or title distinctly put in issue in an action of trespass, such verdict may be pleaded by way of estoppel in another action between the same parties, or their privies, in respect of the same fact or title. (*h*)

Of tender of amends.

By stat. 21 Jac. 1, c. 16, s. 5, it is enacted, that in all actions of trespass *quare clausum fregit*, wherein the defendant or defendants shall disclaim in his or their plea to make any title or claim to the land, to which the trespass is by the declaration supposed to be done, and the trespass be by negligence or involuntary, the defendant or defendants shall be admitted to plead a disclaimer, and that the trespass was by negligence or involuntary, and a tender or offer of sufficient amends for such trespass before action brought. Tender of amends is no plea to a voluntary trespass, as putting cattle into the plaintiff's close (*i*), nor is it,

(*a*) Com. Dig. Pleader, (3 M. 13). Peytoe's case, 9 Rep. 78, a.

(*b*) 1 Rol. Ab. 128, (A).

(*c*) James v. David, 5 T. R. 141.

(*d*) Com. Dig. Pleader, (3 M. 13). Br. Ab. Tresp. 85. Fitz. Ab. Barre, 176. 2 Rol. Ab. 412, l. 22.

(*e*) Com. Dig. Pleader, (3 M. 12).

(*f*) 2 Rol. Ab. 412, l. 20. See Dufresne v. Hutchinson, 3 Taunt. 117.

(*g*) Hurst v. Parker, 1 B. and A. 92. 2 Chitty's Rep. 249, S. C.

(*h*) Outram v. Moorewood, 3 East, 345. See Strutt v. Bovingdon, 5 Esp. N. P. C. 58.

(*i*) 2 Rol. Ab. 570, l. 25. Walgrace's case, Noy, 12.

Of the plea.

Of tender of amends.

as it seems, a good plea to plead that the defendant committed the trespass *by mistake*, and tender of amends. (*a*) The plaintiff may reply a *latitat* sued out, with intent to declare in trespass, before the tender (*b*), or that the amends were not sufficient. (*c*)

Of the replication and new assignment.

To Lib. Ten.

Where the declaration is *general*, without giving a name to the *locus in quo*, or setting out the abuttals, and there is reason to apprehend that the defendant who has pleaded *lib. ten.* has land in the same parish, there, as we have seen (*d*), the plaintiff must new assign, and set out the *locus in quo* with more particularity (*e*), but should the defendant not possess any land in the same parish, the plea may be traversed. Where the plea is in fact true, as where the soil and freehold is in the defendant, but the plaintiff claims by a derivative title, as under a lease for years granted by the defendant, in that case he must admit the defendant's freehold, and insist upon the lease; and so when the plaintiff neither derives title from the defendant, nor has a title inconsistent with his, he may reply his title, without either expressly confessing or denying the plea, as where he claims under a lease for years from a person who was seised of the premises before the defendant's title accrued. (*f*) If the defendant pleads that the *locus in quo* is called by such a name (mentioning the very name of the place where the trespass was committed) and that it is his freehold; in this case, unless there should be two closes of that name in the parish, the plaintiff should not new assign (for the parties are agreed as to the place) but should traverse the plea.

Where the plaintiff names the close in his declaration, and the defendant pleads *liberum tenementum* generally, without setting out the abuttals of the close, the plaintiff may safely traverse the plea, and need not new assign, for he will be allowed to recover on proving a trespass to a close in his possession, bearing the name stated in the declaration, although the defendant may have a close in the same parish known by the same name. (*g*)

As the plaintiff avers that the place new assigned is another and different place from that mentioned in the plea, he waives or abandons the trespass which the defendant has justified. (*h*) The

(*a*) Basely v. Clarkson, 3 Lev. 37.
(*b*) Watts v. Baker, Cro. Car. 264.
(*c*) Com. Dig. Pleader, (3 M. 36).
(*d*) *Ante*, p. 675.
(*e*) Com. Dig. Pleader, (3 M. 34). Lambert v. Stroother, Willes, 218. 1 Saund. 299, b. notes, 5th edit.
(*f*) Key v. Cooke, Sir W. Jones, 352. Cro. Car 384, S. C. Lambert v. Stroother, Willes, 225.
(*g*) Cocker v. Crompton, 1 B. and C. 489.
(*h*) 1 Saund. 299, c. notes, 5th edit.

defendant therefore, cannot plead to the new assignment that the place mentioned therein is the same with that mentioned in the plea, but if in truth they are the same, the defendant should plead *not guilty*, and take advantage of the fact in evidence (*a*); for the plaintiff is estopped from proving a trespass committed in the place mentioned in the plea. (*b*) The defendant may either plead the general issue to the new assignment, or may answer it by fresh matter of justification (*c*), and if the plea to the new assignment is such, as would require a new assignment if pleaded to a declaration, the plaintiff must new assign afresh. (*d*)

Of the replication and new assignment.

To Lib. Ten.

To a plea of right of common the plaintiff cannot reply *de injuriâ*, generally, a right of common being a profit *à prendre* and an interest (*e*); but he may deny the prescriptive or other right of common stated in the plea. (*f*) So he may traverse the measure of the common, viz. that the cattle were the defendant's own cattle, and that they were *levant* and *couchant* upon the premises and commonable cattle, for those three facts together constitute only one point, and therefore the replication is not double. (*g*) But this replication appears only to be proper, when in fact none of the cattle were the defendant's own commonable cattle *levant* and *couchant*, for in case some of the cattle only were not the defendant's commonable cattle *levant* and *couchant*, it seems that the plaintiff should new assign the trespass, by stating that he brought his action for depasturing the common with other cattle, and not traverse the levancy and couchancy, for in trespass it is sufficient to shew any thing which excuses the trespass, and the number mentioned in the declaration is not material. (*h*) The plaintiff may also reply an approvement of the common, if it be common of pasture (*i*), or that the common has

To plea of right of common.

(*a*) *Ibid.* Br. Ab. Tresp. 168. Freeston v. Crouch, Cro. Eliz. 492. Moor, 460, S. C. Vin. Ab. Trespass, (U. a. 4). pl. 9. Bac. Ab. Tresp. (I. 4, 2).

(*b*) Pratt v. Groome, 15 East, 235. Bull. N. P. 92.

(*c*) Bodyam v. Smith, Goldsb. 191. Moor, 540, S. C. Vin. Ab. Tresp. (U. a. 4), pl. 15.

(*d*) 1 Saund. 300, notes, 5th edit.

(*e*) Crogate's case, 8 Rep. 67, a. Cockerill v. Armstrong, Willes, 101.

(*f*) It is better to reply by a direct denial, than with a formal traverse. 1 Saund. 103, c. note, 5th edit.

(*g*) Robinson v. Raley, 1 Burr. 316. Bull. N. P. 93. See 2 B. and C. 908.

(*h*) 1 Saund. 346, e. notes. Ellis v. Rowles, Willes, 638.

(*i*) Glover v. Lane, 3 T. R. 445; but not if it be common of turbary. Grant v. Gunner, 1 Taunt. 435; and see Duberley v. Page, 2 T. R. 391. 1 Saund. 353, b. note (b) 5th edit.

Of the replication and new assignment.

To plea of right of common.

been enclosed for upwards of twenty years, and if issue be taken on this replication, and it appear in evidence that any part of the common has been enclosed less than twenty years, the plaintiff, it has been held, will fail. (*a*) Where in trespass for breaking and entering the plaintiff's close, the defendant in his plea prescribed in right of a messuage and land, for a right of common of pasture on a down or common, whereof the close, &c. before the wrongful separation thereof, was parcel, and justified the trespass because the close in which, &c. was wrongfully enclosed and separated from the rest of the common, and the plaintiff replied that the close in the declaration mentioned, in which, &c. was a close called *Burgey Cleave Garden*, and had for thirty years and more been separated, and divided and enclosed from the common, and occupied and enjoyed during all that time in severalty, and adversely to the person holding the messuage and land, in respect of which the right of common was claimed; and the defendant rejoined that the close in which, &c. had not been occupied or enjoyed for thirty years, or upwards, in severalty or adversely, as alleged in the replication; and the jury found that part of the garden had been enclosed within the thirty years, and that the alleged trespass was committed in that part of the garden only, it was held that upon this finding the defendant was entitled to the verdict, whether the words of the issue "the close in which, &c." constituted an entire or divisible allegation; if it was an entire allegation it comprehended the whole of the enclosure to which the name of *Burgey Cleave Garden* attached, and in that case the plaintiff was bound to prove that the whole of the garden had been enclosed upwards of thirty years, or if it was a divisible allegation, it was confined in its meaning to that spot in which the trespass had been committed, and the jury having found that that spot had not been enclosed thirty years, it was immaterial whether the rest had been so or not. (*b*)

Whenever the right of common does in fact exist, but the defendant has exercised it in a manner different from that in which he is entitled to exercise it, the plaintiff must not traverse the right, but must new assign. (*c*) He must, however, be careful not to new assign, if he intends to deny the right, for where in

(*a*) Hawke v. Bacon, 2 Taunt. 156; or the matter may be given in evidence on a traverse of right of common. See Creach v. Wilmot, 2 Taunt. 160.

(*b*) Richards v. Peake, 2 B. and C. 918.

(*c*) 1 Saund. 300, c. notes, 5th edit.

trespass the defendant pleaded that the place in which, &c. was part of a common allotted to him, to which the plaintiff new assigned that the trespass complained of was in another place, and upon its being admitted in the opening of the plaintiff's counsel to the jury, that the trespass was in the same place, but that the defendant had no title to it, the form of pleading was held to be decisive against the plaintiff's recovery. (*a*)

Of the replication and new assignment.

To plea of right of common.

To a plea of right of way the plaintiff may reply, by denying the right, and on such traverse he may give in evidence that the way has been stopped by the order of two justices; but this order must pursue the form prescribed in the act of parliament, and any material variance will render it invalid. (*b*)

To plea of right of way.

When in fact the plea of right of way is true, but the trespass, for which the plaintiff sues, is not in reality justified by the legal exercise of the right of way, the plaintiff must not traverse the right, but must new assign. Thus, where the defendant pleaded that he was seised in his demesne as of fee of a messuage, &c. in the parish, and that he and all those whose estate, &c. had a right of way for himself, &c. his and their farmers and tenants, occupiers of the messuage, &c. over the *locus in quo*, to and from the messuage, &c. as appertaining thereto, and the plaintiff traversed the prescriptive right, it was held that the defendant's shewing that he was seised in fee of an ancient messuage in the parish, to which a right of way, as pleaded, over the *locus in quo*, belonged, was evidence sufficient to support his plea, though the messuage was let to, and in the occupation of a tenant, and the defendant only occupied a new built house in the parish at the time of the trespass (*c*) If the plaintiff meant to insist that the right stated would not cover the exercise of a right of way to the new house, he should have done so either by a new assignment or by a special replication to that effect. (*d*) Whether the way be by prescription, by grant, by custom, or by express reservation, if the defendant has used it in a different manner from that in which he was entitled to use it, the plaintiff must new assign. (*e*)

(*a*) Case cited in Oakley v. Davis, 16 East, 86.

(*b*) Davison v. Gill, 1 East, 64. Welsh v. Nash, 8 East, 394. De Ponthieu v. Pennyfeather, 5 Taunt. 634. 1 Marsh. 261, S. C. *Ante*, p. 360, note (*c*).

(*c*) Stott v. Stott, 16 East, 343.

(*d*) *Ibid.* 349.

(*e*) 1 Saund. 300, c. notes. Senhouse v. Christian, 1 T. R. 560.

Of the replication and new assignment.

To plea of right of way.

In some cases it is proper both to reply and to plead a new assignment to the same plea. Where the plea on the face of it professes to answer the whole matter of the declaration, but in fact only answers part, as where to a declaration for a trespass to a close called A. the defendant pleads a right of way over A. and in the exercise of such right, justifies the acts complained of, but in fact the defendant not only committed the acts complained of in that part of A. over which the alleged way passes, but also in other parts of A. now the plea, as it has been said, has only "hit some of the places wherein the plaintiff intended the trespass," (*a*) and the trespasses in the other part of the close remain unanswered. In this case, therefore, if the plaintiff is desirous of denying the right of way, thinking that he can recover for the trespasses justified in the plea, as well as for those which are not in fact justified, but only appear to be so, he may traverse the right, and may at the same time new assign *extra viam*, and thus take his chance of recovering for the trespasses committed in every part of the close. Should the plaintiff merely deny the right of way, he might be tricked. Thus if the defendant has committed various trespasses over various parts of the plaintiff's close, over which he has in fact no right of way, and the plaintiff declares generally for the trespasses to his close, and the defendant justifies under a pretended right of way which he sets out by metes and bounds, avoiding those portions of the close in which a majority of the trespasses were committed; in this case, if the plaintiff, knowing the plea to be false, should traverse it only, and not new assign, he would be prevented at the trial from giving evidence of any trespasses committed *extra viam*. Whenever the declaration is sufficiently large to cover not only the trespasses justified by the plea, but also those newly assigned, a replication and new assignment will be good; but where the plea covers the whole of the trespasses which could be proved under the declaration, there the plaintiff cannot both reply and new assign. Thus where in trespass for stopping the plaintiff's cattle and cart on such a day without "divers days and times," the defendant pleaded a plea in justification, which covered the single trespass so alleged, it was held that the plaintiff could not both reply and new assign. (*b*)

(*a*) Prettyman v. Lawrence, Cro. Eliz. 812; and see Odiham v. Smith, Cro. Eliz. 589.

(*b*) Taylor v. Smith, 7 Taunt. 156. Cheasley v. Barnes, 10 East, 73; and see Phillips v. Howgate, 5 B. and A. 220.

Of the replication and new assignment.

Where the plea does not at all meet the place in the declaration, but justifies the trespass in some other place of the same name, or otherwise upon some legal ground of defence, it must not be stated in the new assignment that the action was brought as well for the trespass justified, as for that which is new assigned, for the trespass justified is abandoned; but where the plaintiff both answers the plea and new assigns, it is usual to aver in the new assignment that the action was brought as well for the trespass mentioned in the plea, as for the trespass which is new assigned. (*a*)

To plea of right of way.

To plea of defect of fences.

To a plea of escape of cattle, through defect of fences, which the plaintiff was bound to repair, the plaintiff may reply *de injuriâ* generally, as the plea contains mere matter of excuse (*b*), or he may traverse the obligation to repair, or the defect of the fences (*c*), or the escape of the cattle *modo et formâ* (*d*), or he may reply that the fences were sufficient, but that the defendant's cattle were wild and unruly, and threw them down. (*e*)

To plea of justification under legal process.

To a plea of justification under legal process, issuing out of a court of record, the plaintiff cannot reply *de injuriâ suâ propriâ absque tali causâ* generally, because matter of record would then be put in issue; but if the process issue out of the hundred or county court, or other court not of record, such replication is good. (*f*) Where to a plea of justification, under a judgment recovered in a court baron, and a precept issued thereon, the plaintiff replied, that there was not any memorandum of the proceedings, or of the said supposed judgment remaining in the said court baron, it was held, on general demurrer, that the replication was bad, inasmuch as it put in issue an immaterial fact. (*g*) If the process issues out of a court of record, the plaintiff must either deny the issuing of the writ, or the making of the warrant, or admitting or protesting the writ or warrant, must reply *de injuriâ suâ propriâ absque residuo causæ.* (*h*) Whenever the plain-

(*a*) 1 Saund. 300, c. notes, 5th edit.

(*b*) Com. Dig. Pleader, (3 M. 29). Cooper v. Monke, Willes, 54.

(*c*) Com. Dig. Pleader, (3 M. 29).

(*d*) *Ibid.* 2 Lutw. 1358.

(*e*) Com. Dig. Pleader, (3 M. 29). Rast. Ent. 621, a.

(*f*) Crogate's case, 8 Rep. 67, a. Com. Dig. Pleader, (F. 20). Doctr. Pl. 114. Dyson v. Wood, 3 B. and C. 453.

(*g*) Dyson v. Wood, 3 B. and C. 449. Littledale, J. doubted whether the replication was not bad on special demurrer only.

(*h*) 2 Saund. 295, note, 5th edit. Monprivatt v. Smith, 2 Camp. N. P. C. 175.

Of the replication and new assignment.

To plea of justification under legal process.

tiff cannot dispute the writ or warrant pleaded by the defendant, but relies upon the illegal conduct of the defendant, in exceeding the power given him by the process, he must reply or new assign such illegal conduct. Thus in an action of trespass for breaking and entering the plaintiff's house, staying there three weeks, and seizing and carrying away his goods, the defendant pleaded, first, not guilty to the whole, and, secondly, as to breaking and entering the house, and staying there twenty-four hours, part of the said time in the declaration mentioned, and also as to the seizing and carrying away the goods, pleaded a justification under a writ of *fieri facias*, and the plaintiff replied to the last plea, admitting the writ, *de injuriâ suâ absque residuo causæ;* Lord Ellenborough held that the plea of justification applied to the whole declaration, and that if the plaintiff meant to rely upon the excess beyond the twenty-four hours, he ought to have said so by a new assignment; that the *residue of the cause* mentioned in the plea was alone put in issue, and that the length of time during which the officers staid in the house, was rendered immaterial. (*a*) So where in trespass for breaking and entering the plaintiff's house, and expelling him therefrom, the breaking and entering, being the gist of the action, and the expulsion merely aggravation, a justification under legal process as to the breaking and entering will cover the whole declaration; and if the plaintiff mean to insist upon the expulsion, as making the defendant a trespasser *ab initio*, he must reply it. (*b*) If there be an irregularity in the process, which renders the defendant a trespasser, the plaintiff ought not to new assign, but should traverse the plea, for should he new assign, and not be able to prove more than one trespass, he will not be allowed to recover for such trespass, it being covered by the plea. (*c*)

To plea of licence.

To the plea of a licence, the plaintiff may reply by denying the licence, but he cannot reply generally *de injuriâ*, &c. (*d*) If in fact there was a licence, which the plaintiff revoked before any of the trespasses committed, or which the defendant exceeded,

(*a*) Monprivatt v. Smith, 2 Campb. N.P.C. 176; and see Warrall v. Clare, 2 Campb. N.P.C. 629. Lambert v. Hodgson, 1 Bingh. 317.

(*b*) Taylor v. Cole, 3 T.R. 292. This is said to be more properly a replication than a new assignment. Saund. 300, d. notes. Instead of admitting, it goes to destroy the effect of the plea, for if the defendant was a trespasser *ab initio*, then his plea is false.

(*c*) Oakley v. Davis, 16 East, 82.

(*d*) Com. Dig. Pleader, (F. 22). Doct. Pl. 115, but see 11 East, 451.

the revocation, or excess, must be stated in a new assignment. (*a*) And where a man abuses a licence or authority which the law gives him, and such licence or authority is pleaded, the plaintiff must reply the abuse, and such replication is in the nature of a new assignment. (*b*) But where the declaration states the trespasses to have been committed on divers days and times, and the defendant pleads a licence generally, *to which the plaintiff replies, de injuriâ suâ propriâ absque tali causâ*, the defendant is bound to shew a licence coextensive with the trespasses proved, and the plaintiff will succeed, unless the defendant can shew a licence for each trespass proved by the plaintiff. (*c*) Where the defendant pleads an entry to abate a nuisance, and the plaintiff new assigns unnecessary violence, the plaintiff cannot go into evidence to negative the nuisance. (*d*)

Of the replication and new assignment.

To plea of licence.

Where the defendant pleads an entry to view waste, the plaintiff cannot reply *de injuriâ* generally, because the seisin of the defendant would be involved in the issue. (*e*)

Of costs.

By the statute of Gloucester, the plaintiff who recovered damages, in an action of trespass, was entitled to his full costs, whatever was the amount of the damages. The operation of that statute has been narrowed by the statute 22 and 23 Car. 2, c. 9, and the latter enactment again has been partially enlarged by the statutes 4 and 5 W. and M. c. 23, and 8 and 9 W. 3, c. 11. Before considering these statutes, it will be proper to inquire in what manner the costs are given where the *plaintiff* has judgment as to part, and the *defendant* as to the rest; and where the defendant has judgment on a plea, which goes to the whole of the declaration.

Where plaintiff has judgment for part, and defendant for part.

The rule with regard to costs, where the plaintiff has judgment for part of his demand, and the defendant for the residue, is thus laid down in a late case. (*f*) When the plaintiff's demand is altogether denied by the defendant's pleas, and at the trial the

(*a*) Ditcham v. Bond, 3 Campb. N. P. C. 524. 1 Saund. 300, d. notes, 5th edit.

(*b*) Six Carpenters' case, 8 Rep. 146. Dye v. Leatherdale, 3 Wils. 20. Taylor v. Cole, 3 T. R. 292. 1 Saund. 300, d. notes. This is not a new assignment, because it does not admit, but destroys the defendant's justification, by shewing him a trespasser *ab initio*.

(*c*) Barnes v. Hunt, 11 East, 451.

(*d*) Pickering v. Rudd, 1 Stark. N. P. C. 56.

(*e*) Chancey v. Win, 12 Mod. 582. See Langford v. Waghorn, 7 Price, 670.

(*f*) House v. Thames Commissioners, 3 Brod. and Bing. 119.

Of costs.

plaintiff obtains a verdict for part of his demand, and the defendant obtains a verdict as to other part, the plaintiff is entitled to the costs of the issues found for him, which include the general costs of the trial, but do not include the costs of the issues found for the defendant, on which last mentioned issues, however, the defendant is not entitled to any costs from the plaintiff; but where the defendant suffers judgment by default as to part of the plaintiff's demand, and pleads only as to other part, and the plaintiff takes issue on the pleas, and at the trial all the issues are found for the defendant, there the defendant is entitled to the costs of the issues found for him, and the plaintiff is entitled only to the costs of the judgment by default. (*a*)

Where a plea going to the whole declaration is found for defendant.

The plaintiff, however, has in no case a right to costs, except when he is entitled to judgment upon the whole record; and therefore where in trespass for breaking and entering the plaintiff's free fishery in A., and also in B., and also in A. and B., the defendant pleaded, first, not guilty, and, secondly, that the said free fisheries were part of a navigable harbour, &c., common to all the king's subjects, to which the plaintiff replied, prescribing for a free fishery in the said place, in right of his manor; and the defendant rejoined, taking issue on such prescription; it was held that, on a verdict for the plaintiff on the general issue, and for the defendant on the prescription, the latter going to the whole declaration, the plaintiff was not entitled to costs. (*b*) And where a plea going to the whole of the declaration is found for the defendant, and other issues are found for the plaintiff, the former is entitled to the costs of the cause, and the latter to the costs of the issues found for him, that is to say, the costs of the pleadings on those issues only. (*c*)

Stat. 22 and 23 C. 2.

By statute 22 and 23 Car. 2, c. 9, it is enacted, that in all actions of trespass, assault, and battery, and other personal actions, wherein the judge, at the trial of the cause, shall not find and certify (*d*), under his hand, upon the back of the record,

(*a*) See Postan v. Stanway, 5 East, 261. Trotman v. Holder, 1 Brod. and Bing. 222. Day v. Hanks, 3 T. R. 654. Griffiths v. Davies, 8 T. R. 466. Tidd's Pr. 1008, 1010, 8th edit.

(*b*) Vivian v. Blake, 11 East, 263. Edwards v. Bethell, 1 Barn. and Ald. 254. Tidd's Pr. 1012, 8th edit.

(*c*) Benett v. Coster, 1 B. and B. 466. 4 B. Moore, 110, S. C. Other v. Calvert, 1 Bingh. 275.

(*d*) This certificate need not be granted at the trial. 11 Mod. 198, 2 B. and C. 621. The award of an arbitrator is not equivalent to a certificate. 3 T. R. 138.

Of costs.

Stat. 22 and 23 C. 2.

that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question, the plaintiff in such action, in case the jury shall find the damages to be under 40*s.*, shall not recover or obtain more costs of suit, than the damages so found shall amount unto.

To what actions it extends.

This statute has been construed to extend only to the two species of actions therein specially named, and the action of *trespass* there mentioned, is confined to trespass *quare clausum fregit*, in which the freehold, or title to the land, may come in question. (*a*) Where the plaintiff, therefore, declares for an injury to the freehold, or to something growing upon (*b*), or affixed to (*c*) the freehold, as breaking a lock affixed to the plaintiff's gate, the case is within the statute. (*d*) And although the declaration charges the defendant with taking and carrying away the soil and earth, &c., if this be merely a mode or qualification of the injury done to the land, the case is still within the statute. (*e*)

Not to injuries to chattels.

But where an injury to a personal chattel is laid in the same declaration with a trespass to real property, as a substantive and independent injury, either in the same count with the trespass to the land (*f*), or in a separate count (*g*), and general damages are given for the plaintiff, the case is not within the statute, and the plaintiff will be entitled to full costs without a certificate, though his damages be under 40*s.* But should the plaintiff fail to prove the injury to the chattel, and there is a verdict for the defendant on that part of the declaration, the case is again brought within the operation of the statute. (*h*)

Or action first brought in inferior court.

When the action was originally commenced in an inferior court, from which it has been removed into the King's Bench or Common Pleas, the statute does not apply, and the plaintiff shall have his full costs, though the damages be under 40*s.* (*i*)

(*a*) *Per* Willis, C. J. Milbourne v. Read, 5 Wils. 323. *Per* Ld. Ellenborough, C. J. Stead v. Gamble, 7 East, 328. Trespass *q. c. f.* to a free warren, is not within the statute. 2 W. Bl. 1151.

(*b*) Stead v. Gamble, 7 East, 326. Bull. N. P. 329.

(*c*) Bull. N. P. 329. Barnes, 121.

(*d*) Butler v. Cozens, 11 Mod. 198. 6 Vin. Ab. 357, S. C.

(*e*) Clegg v. Molyneux, Dougl. 779. Tidd's Pr. 1000, 8th edit.

(*f*) Anderson v. Buckton, 1 Str. 192. Thompson v. Berry, 1 Str. 551. Smith v. Clarke, 2 Str. 1130. Gosson v. Graham, 1 Stark. N. P. C. 55.

(*g*) Barnes v. Edgard, 3 Mod. 40.

(*h*) Ca. Pr. C. P. 118. Tidd's Pr. 1000, 8th edit.

(*i*) Roop v. Scritch, 4 Mod. 379. Archbp. of Canterbury v. Fuller, 1 Ld. Raym. 395, B. N. P. 330; but see stat. 58 G. 3, c. 30, s. 1, as to costs in trespass for assault and battery.

Of costs.

Statute 22, and 23, C. 2.

Nor where the defendant justifies.

Nor are those cases within the statute, where the defendant pleads a special plea of justification which is found against him, for it must then appear, either that the freehold cannot come in question, in which case the statute does not apply, or that the freehold does come in question, in which case a certificate is unnecessary. Thus where to trespass *quare clausum fregit*, the defendant pleaded the general issue and a licence, and, on issue joined, both the pleas were found for the plaintiff, with one shilling damages, he was held entitled to his full costs, it being a general rule, that whenever a special plea of justification is found against the defendant, the plaintiff is entitled to his full costs. (*a*) However, in a late case, where the plaintiff declared for a trespass at A., and throwing down, burning, and totally destroying his hedge there then erected, and the defendant pleaded the general issue, and justified as to throwing down the hedge, because it was erected on a common, over which he prescribed for right of common, and a verdict was found for the plaintiff on the general issue, with 20*s.* damages, and for the defendant on the special plea, it was held that this was to be considered as an action of trespass *quare clausum fregit*, and destroying and burning the plaintiff's hedge, which was part of the freehold, in which the freehold might have come in question, and that the damages being under 40*s.*, and no certificate, that there could be no more costs than damages. (*b*) The granting of a view does not entitle the plaintiff to his full costs, where he recovers damages under 40*s.* (*c*)

Costs on new assignment.

Where defendant pleads not guilty to new assignment.

As the plaintiff is not entitled to full costs, and a certificate is necessary in trespass *quare clausum fregit* whenever the defendant pleads the general issue, and less than 40*s.* damages are given; so when the defendant justifies, and the plaintiff admits the justification and new assigns, to which the defendant pleads not guilty, and a verdict for less than 40*s.* damages is found for the plaintiff, it has been contended, that the law is the same as on not guilty only pleaded to the declaration, for that the matter of the justification is admitted, and the question of right to the freehold, which might have arisen under the special plea, is waived, and that consequently the plaintiff is not entitled to his costs

(*a*) Rodridge v. Palmer, 2 H. Bl. 2. Comer v. Baker, 2 H. Bl. 341. Peddell v. Kiddle, 7 T. R. 659.

(*b*) Stead v. Gamble, 7 East, 526.

(*c*) Flint v. Hill, 11 East, 184.

Of costs.

Stat. 22 and 23 C. 2.

Costs on new assignment.

without a certificate. (*a*) Whether he be so or not appears to depend on the effect of the new assignment upon the plea of justification. If the plea be such, that the new assignment wholly admits it, so that on the issue joined on the new assignment, the subject matter of the plea cannot come in question, there it will be the same as if not guilty had been pleaded to the declaration, and the plaintiff who recovers a verdict for less than 40*s.* will not be entitled to his costs. Thus, where the plea set out a right of way *by metes and bounds*, and the plaintiff new assigned *extra viam*, and recovered less than 40*s.*, it was held that the plaintiff was not entitled to his costs (*b*), for the extent of the way was admitted, and no question could arise as to any trespasses committed within that extent; so where to trespass for breaking the plaintiff's house and taking his goods, the defendant justified under a warrant, and the plaintiff newly assigned that the defendant continued after the return of the writ (*c*); for the matter of justification is thereby admitted and wholly put out of the record. But, where the plea is such, that the new assignment does not wholly waive the consideration of it, as where the defendant justifies under a right of way, and the plaintiff without traversing the plea, new assigns *extra viam*, and on not guilty to the new assignment, a verdict for less than 40*s.* is found for the plaintiff, he is still entitled to his costs, for, in order to determine whether or not the trespasses complained of were committed *extra viam*, it is necessary to take cognisance of the metes and bounds of the way, which, not being set out, are not admitted by the new assignment (*d*); and so where the plaintiff to a similar plea, both traverses the plea, and new assigns, and a verdict is found for the defendant on the traverse of the justification. (*e*) In these cases, as it has been observed, though the right, as claimed by the plea, be determined in favour of the defendant, yet the applicability of that right to the trespass complained of is put in issue by the new assignment and plea thereto, and therefore it appears by the whole record, whether the freehold came in question or not. (*f*) Although

(*a*) Ibbotson v. Browne, Barnes, 129. 1 East, 351, *arg.*

(*b*) Cockerill v. Allanson, Hull. on Costs, 76. 1 Saund. 300, a, (2) 5th ed.

(*c*) Gregory v. Ormerod, 4 Taunt. 98.

(*d*) Anser v. Finch, 2 Lev. 234; recognised in Taylor v. Nicholls, 3 B. and A. 443. 1 Saund. 300, a, (2) 5th ed.

(*e*) Martin v. Vallance, 1 East, 350.

(*f*) 1 Saund. 300, new notes; but *quære* whether the freehold might not come in question on the plea of *not*

Of costs.

Stat. 22 and 23 C. 2.

Costs on new assignment.

the plea of justification be found for the defendant, yet the plaintiff is entitled to his costs under the rule, that where the plaintiff's demand is altogether denied by the defendant's pleas, and at the trial the plaintiff obtains a verdict for part of his demand, and the defendant obtains a verdict as to other part, the plaintiff is entitled to the general costs, deducting the costs on those parts in which he fails, but not allowing the defendant his costs thereon. (*a*)

Where the defendant suffers judgment by default on new assignment.

In the above cases it will be observed, that the defendant pleaded to the new assignment, and the plaintiff was therefore compelled to go down to trial on such issue. But, where the defendant, instead of pleading to the new assignment, suffers judgment to go by default, and the plaintiff proceeds to trial on the special plea of justification, which is found against him; in this case, although he will be entitled to his costs on the judgment by default, yet the defendant will be allowed the general costs, and the reason of this is, that it was the plaintiff's own fault in going down to trial, for he might have entered a *nol. pros.* as to the plea of justification, and have assessed his damages on the new assignment before the sheriff. (*b*) These cases come within the rule, that where the defendant suffers judgment by default as to part of the plaintiff's demand, and pleads only as to other part, and the plaintiff takes issue on the pleas, and at the trial all the issues are found for the defendant, there the defendant is entitled to the costs of the issues found for him, and the plaintiff is entitled only to the costs of the judgment by default. (*c*)

Where the defendant suffers judgment by default on new assignment, but leaves a general plea of not guilty on the record.

In the last mentioned cases the plaintiff was not compelled to go down to trial, and having done so unnecessarily, was held not entitled to the general costs; but, when a general plea of *not guilty* is left upon the record, the plaintiff is still compelled to go down to trial, although the defendant has suffered judgment by default upon the new assignment, and, in that case, though the issues on the justifications should be found for the defendant, yet the plaintiff will be entitled to the general costs of the cause, for he has not gone down to trial unnecessarily, as in the cases mentioned in the preceding paragraph. Thus, where the de-

guilty to the new assignment. The defendant might claim the freehold of the close *extra viam*.

(*a*) House v. Thames' Commissioners, 3 Brod. and Bing. 119.

(*b*) Thornton v. Williamson, 13 East, 191. Harber v. Rand, 9 Price, 336; in which case he would be entitled to full costs, though the damages be under 40*s*. B. N. P. 329.

(*c*) House v. Thames' Commissioners, 3 Brod. and Bing. 119.

fendant pleaded not guilty, and a plea of licence, and the plaintiff took issue on the plea of not guilty, traversed the licence, and also new assigned, and the defendant took issue on the traverse of the licence, and let judgment go by default on the new assignment, and the jury found for the plaintiff on the general issue, without any damages thereon, for the defendant on the plea of licence, and assessed one shilling damages, and one shilling costs for the plaintiff on the new assignment, the court held, that the plaintiff was entitled to the general costs, for the defendant, by pleading the general issue to the whole declaration, made it necessary for the plaintiff, in order to get rid of that plea, which would otherwise have barred his whole action, to go to trial at the assises, since he could not by any other means have obtained damages or costs on the judgment by default. (*a*)

Of costs.

Stat. 12 and 23 C. 2.

Costs on new assignment.

By statute 8 and 9 W. 3, c. 11, s. 4, for the preventing of wilful and malicious trespasses, it is enacted, "that in all actions of trespass, to be commenced or prosecuted in any of His Majesty's courts of record at Westminster, wherein at the trial of the cause it shall appear and be certified by the judge, under his hand, upon the back of the record, that the trespass upon which any defendant shall be found guilty was *wilful* and *malicious*, the plaintiff shall recover not only his damages, but his *full* costs of suit, any former law to the contrary notwithstanding." The certificate on this act need not be granted at the trial of the cause. (*b*) It has been usual for the judge to consider himself bound to certify that the trespass was wilful and malicious, if it appear at the trial that the trespass, however trifling, was committed after notice, and the jury give less than forty shillings damages. (*c*) The granting of a certificate, however, upon this statute, seems to be discretionary in the judge before whom the trial is had; he may certify, or not, according as it appears to him under the circumstances proved, that the trespass was wilful and malicious. Thus, where the judge declined to certify in a case in which notice was given by the wife of the plaintiff to the defendant not to enter the *locus in quo* in his cart, there being no

Stat. 8 and 9 W. 3.

(*a*) House v. Commissioners of the Thames, 3 Br. and Bing. 117; and see Longden v. Bourne, 1 B. and C. 278. 1 Saund. 300, a. new notes.

(*b*) Woolley v. Whitby, 2 Barn. and Cres. 580.

(*c*) Reynold v. Edwards, 6 T. R. 11. Harper v. Carr, 7 T. R. 449.

Of costs.

Stat. 8 and 9 W. 3.

road there, notwithstanding which the defendant persisted in going on, for the purpose of viewing more conveniently the turning in of some cattle, in assertion of a disputed right of common in an adjoining inclosure of the plaintiff's, which right was found for the defendant on a justification pleaded, the court refused to interfere. (*a*)

Stat. 4 and 5 W. and M.

By the statute 4 and 5 W. and M. c. 23, s. 10, reciting that great mischiefs ensue by inferior tradesmen, apprentices, and other dissolute persons neglecting their trades and employments, who follow hunting, fishing, and other game, to the ruin of themselves and damage of their neighbours, it is enacted, that "if any such person shall presume to hunt, hawk, fish, or fowl, unless in company with the master of such apprentice duly qualified by law, such person shall be subject to the penalties of this act, and shall or may be sued or prosecuted for his wilful trespass in such his coming on any person's land; and if found guilty thereof, the plaintiff shall not only recover his damages thereby sustained, but his *full* costs of suit, any former law to the contrary, notwithstanding." Upon this statute it has been held, that a clothier and alehouse-keeper is an inferior tradesman (*b*), but the court of King's Bench was equally divided on the question, whether a surgeon and apothecary not qualified, was within the act. (*c*) It has been laid down, that every tradesman not qualified is an inferior tradesman within the act. (*d*) In trespass, where the plaintiff declared, "for that the defendant being a dissolute person, neglecting his employment, and following hunting and other game, and by no means qualified by law so to do," broke and entered the plaintiff's closes, and the plaintiff proved the trespass, but not that the defendant was a dissolute person, &c. within the act, it was held, that no more costs than damages could be given, the latter being under 40*s*. (*e*)

(*a*) Good v. Watkins, 3 East, 495; but see R. v. Inhabitants of Chadderton, 5 T. R. 273.

(*b*) Wickam v. Walker, Barnes, 125. 1 Ld. Raym. 149. Com. Rep. 26.

(*c*) Buxton v. Mingay, 2 Wils. 70.

(*d*) *Per* Holt, C. J. Wickham v. Walker, Barnes, 125; but see Buxton v. Mingay, *ubi sup.*

(*e*) Pallant v. Roll, 2 W. Bl. 900.

Trespass for Mesne Profits.

When the owner of land has been ousted, we have seen (*a*) that an action of trespass may be maintained, after his re-entry, and that in such action he will be entitled to recover for all the trespasses committed from the time of the ouster, since by the re-entry his possession is revested *ab initio*. This principle is the foundation of the action of trespass for mesne profits. A recovery and execution in ejectment being in fact the same thing as an entry, the plaintiff is considered in law to have been in the actual possession of the estate from the day of the demise laid in the declaration, and may maintain an action of trespass against the defendant as a wrong doer, and trespasser upon his estate from that day. (*b*)

By statute 1 Geo. 4, c. 87, s. 2, in cases of ejectment between landlord and tenant, the plaintiff may, at the trial, go into evidence of the mesne profits, and the jury shall find the amount of the damages to be paid for such mesne profits, down to the time of verdict. (*c*)

By whom.

This action may be brought either in the name of the lessor of the plaintiff, or, whenever the record in ejectment is evidence of the title, of the nominal plaintiff in ejectment, (*d*) but, where that is not the case, as where the action is brought against a precedent occupier, or for the profits anterior to the demise laid in the declaration, it must be brought in the name of the lessor of the plaintiff, who will be compelled to give evidence of his title. (*e*) If the action is brought by the nominal plaintiff, the court will, upon application, stay the suit till security is given for answering the costs. (*f*) The action may be brought in the name of the nominal plaintiff after a judgment in ejectment by default, as well

(*a*) *Ante*, p. 663.
(*b*) 1 Saund. 277, a. notes, 5th ed.
(*c*) *Ante*, p. 598.
(*d*) Where the nominal plaintiff has recovered in this action he may sue the sheriff for an escape. Doe v. Jones, 2 M. and S. 473.
(*e*) Bull. N. P. 87.
(*f*) *Ibid.* 89.

as after verdict, the right of the plaintiff being in the one case tried and determined, and in the other confessed. (*a*)

A tenant in common, who has recovered in ejectment against his cotenant, may maintain this action for the mesne profits. (*b*)

Against whom.

The action may be brought either against the person who was the defendant in the ejectment, or who was tenant in possession at the time of the ejectment brought (*c*), or against a former occupier. (*d*) Any person found in possession after a recovery in ejectment, is liable to an action, and it is no defence to say that he was upon the premises as the agent, and under the licence of the defendant in ejectment, for no one can licence another to do an illegal act. But the measure of the damages in such case will not be the whole mesne profits of the lands, but will depend upon the time such person has had them in his occupation, together with the other circumstances of the case. (*e*) An action of trespass for mesne profits cannot be maintained against executors or administrators, for profits accruing in the lifetime of their testator or intestate. (*f*)

What may be recovered.

The plaintiff in this action may recover not only the actual mesne profits, but also damages for his trouble, &c. (*g*); though where he has entered to avoid a fine, he will not be entitled to recover the mesne profits anterior to such entry, for the doctrine of relation is held not to extend to such case. (*h*) Where in an action of ejectment judgment has been obtained by default against the casual ejector, the costs of such action may be recovered in trespass for the mesne profits, which, as already stated, is the only means of recovering such costs (*i*); and the taxed costs, but not any extra costs, may also be recovered in this action where the ejectment has been defended (*k*), though it is more usual to proceed for these costs by *fi. fa.* or attachment. (*l*) Where,

(*a*) Aslin v. Packer, 2 Burr. 665. Barnes, 472. S. C.

(*b*) Goodtitle v. Tombs, 3 Wils. 118.

(*c*) Aslin v. Packer, 2 Burr. 665. Hunter v. Britts, 3 Campb. N. P. C. 455.

(*d*) Bull. N. P. 87.

(*e*) Girdlestone v. Porter, K. B. M. T. 39 G. 3. Woodf. L. and T. 511. Adams Eject. 331, 2nd ed.

(*f*) Pulteney v. Warren, 6 Ves. 73.

(*g*) Goodtitle v. Tombs, 3 Wils. 121.

(*h*) Compere v. Hicks, 7 T. R. 727. Hughes v. Thomas, 13 East, 486.

(*i*) *Ante*, p. 604.

(*k*) Doe v. Davis, 1 Esp. N. P. C. 358. Brooke v. Bridges, 7 B. Moore, 471.

(*l*) *Ante*, p. 605.

after a recovery in ejectment, and before the action for mesne profits, the defendant became a bankrupt, and on judgment by default in the latter action, the jury omitted to include the taxed costs of the ejectment in the damages, the court refused to set aside the inquisition. (*a*)

Declaration.

The declaration, as in the usual form of trespass *quare clausum fregit*, must state the premises into which the defendant entered, and unless they are described with sufficient particularity, the defendant, if he has other lands in the same parish, may plead *liberum tenementum*. The declaration should also state the day on which the defendant broke and entered the close, and the length of time during which he continued in possession, but the omission of these matters is cured after judgment by default, by statute 4 Anne, c. 16. (*b*)

Plea and defence.

The general issue in this action is *not guilty:* and if the plaintiff seeks to recover the mesne profits for a longer period than six years, the defendant may plead the statute of limitations. (*c*) The bankruptcy of the defendant cannot be pleaded in this action, the demand being for unliquidated damages (*d*), nor is a plea of a discharge under the insolvent act (53 Geo. 3, c. 102,) a bar. (*e*) Under *not guilty* it is no defence that the plaintiff accepted the rent of the premises for the time in dispute, and agreed to waive the costs of the ejectment, for such defence is in substance that a part of the damages had been accepted in satisfaction of the whole, whereas the plea is, that no trespass has been committed. (*f*) Unless the defendant is estopped by the record in the action of ejectment, he may controvert the plaintiff's title. (*g*)

The defendant cannot pay money into court in this action. (*h*)

Evidence.

The judgment in ejectment is sufficient proof of title for the plaintiff in this action, whether it be brought by the lessor of the plaintiff, or by the nominal plaintiff, against all who are par-

(*a*) Galliver v. Drinkwater, 2 T. R. 261.
(*b*) Higgins v. Highfield, 13 East, 407.
(*c*) Bull. N. P. 88.
(*d*) Goodtitle v. North, Dougl. 584.
(*e*) Doe d. Hill v. Lee, Taunt. 459.
(*f*) Lloyd v. Peel, 3 B. and A. 407.
(*g*) See *post*, p. 708.
(*h*) Holdfast v. Morris, 2 Wils. 115.

ties to such judgment (*a*), but such judgment is only evidence of title from the time of the demise laid in the declaration in ejectment, and therefore if the plaintiff seeks to recover damages anterior to that time, it will be necessary for him to give further evidence of his title. (*b*) The judgment is not evidence against a stranger, and therefore it has been held that a judgment in ejectment against the wife cannot be given in evidence against the husband in an action for mesne profits. (*c*) And where after a judgment by default against the casual ejector, an action of trespass was brought for the mesne profits against the landlord, who had been in the receipt of the rents and profits from the day of the demise, Lord Ellenborough ruled that the judgment in ejectment was not evidence of title against the defendant without notice of the ejectment; but that a subsequent promise by him to pay the rent and costs amounted to an admission that he was a trespasser, and that the plaintiff was entitled to the possession. (*d*) So where the action is brought against a former occupier, the judgment in ejectment will be no evidence of the plaintiff's title. (*e*) The judgment in an action of ejectment, on the several demises of two or more persons, is evidence for them in an action of trespass brought by them jointly. (*f*)

As the plaintiff's title to recover the mesne profits depends upon his re-entry into the premises, which has the effect of vesting the possession in him by relation for the whole period, during which he has been out of possession, it is incumbent upon him to give evidence of such re-entry. Where the action is brought against a person who was a party to the ejectment, and entered into the consent rule, proof of the judgment in ejectment is said to be sufficient, without proving the writ of possession executed, because by entering into the rule to confess, the defendant is estopped, both as to the lessor and the lessee, so that either may maintain trespass without proving an actual entry (*g*); but where the judgment in ejectment is against the casual ejector, and so no rule has been entered into, the lessor cannot maintain

(*a*) Aslin v. Packer, 2 Burr. 665. Bull. N. P. 87. The judgment is to be proved in the regular manner by an examined copy.

(*b*) Bull. N. P. 87.

(*c*) Denn v. White, 7 T. R. 111.

(*d*) Hunter v. Britts, 3 Campb. N. P. C. 455.

(*e*) Bull. N. P. 87.

(*f*) Chamier v. Clingo, 5 M. and S. 64. 2 Chitty's Rep. 416, S. C.

(*g*) Bull. N. P. 87.

trespass without an actual entry, and therefore ought to prove the writ of possession executed (*a*), which is usually done by producing an examined copy of the writ, and of the sheriff's return. (*b*) The plaintiff may also prove a re-entry by other means than by shewing the writ of possession executed, thus it is sufficient, if he proves that he has been let into possession with the consent of the defendant. (*c*)

Damages.

The plaintiff must be prepared to prove the amount of his damages, by showing how long the defendant has been in possession of the premises, the value of the mesne profits (*d*), and the costs in the ejectment, if they are to be recovered in this action.

Costs.

If the plaintiff recovers less than forty shillings damages, and the judge does not certify that the freehold came in question, the plaintiff is entitled to no more costs than damages. (*e*)

(*a*) *Ibid.* and the cases cited, 2 Selw. N. P. 722, 4th edit.
(*b*) 2 Phill. Evid. 262, 6th edit.
(*c*) Calvert v. Horsfall, 4 Esp. N. P. C. 167.
(*d*) Bull. N. P. 87.
(*e*) Doe v. Davies, 6 T. R. 593.

THE END.

ADDENDA.

P. 62.—Since the foregoing sheets were printed, the doctrine of disseisin at election has come incidentally into discussion, and the principles laid down by Lord Mansfield, in the case of Doe d. Atkins v. Horde, have been recognised by the court of King's Bench. (See Doe d. Maddock v. Lynes, 3 B. and C. 388.) Holroyd, J. observing, that the nature of a feoffment and disseisin was materially altered since the time of Littleton.

P. 109, note (*m*).—As to prohibition of waste, and in what cases it will lie to restrain a bishop from committing waste in the possessions of his see, *vide* Jefferson v. Bishop of Durham, 1 Bos. and Pul. 105.

P. 179.—Where a judge made an order to amend a writ of right to enable the demandant, instead of demanding freehold lands, to allege, that he was seised at the will of the lord, the court discharged the order. Tooth v. Boddington, 1 Bing. 208.

P. 256.—See stat. 6 Geo. 4, c. 50, s. 23, 24.

P. 296, note (*h*) add the following references: Com. Dig. Evid. (A. 5). 1 Phill. Evid. 308. 6th edit. But see Gilb. Evid. 35, 4th edit. Bull. N. P. 232. 1 Stark. Evid. 192.

P. 446.—By statute 6 Geo. 4, c. 16, s. 75, it is enacted, "that any bankrupt entitled to any lease, or agreement for a lease, if the assignees accept the same, shall not be liable to pay any rent accruing after the date of the commission, or to be sued in respect of any subsequent non-observance, or non-performance of the conditions, covenants, or agreements therein contained, and if the assignees decline the same, shall not be liable as afore-

said, in case he deliver up such lease or agreement to the lessor, or such person agreeing to grant a lease within fourteen days after he shall have had notice that the assignee shall have declined as aforesaid; and if the assignees shall not, upon being thereto required, elect whether they will accept or decline such lease, or agreement for a lease, the lessor or person so agreeing as aforesaid, or any person entitled under such lessor or person so agreeing, shall be entitled to apply by petition to the Lord Chancellor, who may order them so to elect, and to deliver up such lease or agreement, in case they shall decline the same, and the possession of the premises, or may make such other order therein as he shall think fit."

P. 502.—Adverse possession in ejectment. A. being seised in fee of an undivided moiety of an estate, devised the same, (by will made some years before her death,) to her nephew and two nieces, as tenants in common; one of the nieces died in the lifetime of A., and left an infant daughter. A. by another will, intended to have devised the moiety to the nephew and surviving niece, and the infant daughter of the deceased niece; but this will was never executed. After A.'s death, the nephew and surviving niece covenanted to carry the unexecuted will into execution, and to convey one third of the moiety to a trustee upon trust, to convey the same to the infant if she attained twenty-one, or to her issue if she died under twenty-one, and left issue; or otherwise to the nephew and niece in equal moieties. No conveyance was executed in pursuance of the deed. The rents of the third were received by the trustee for the use of the infant, during her lifetime. An ejectment having been brought by the devisee of the nephew more than twenty years after his death, but less than twenty years after the death of the infant, it was held, that there was no adverse possession until the death of the infant, and that the ejectment was well brought. Doe d. Colclough v. Hulse, 3 B. and C. 757.

P. 509.—By stat. 6 Geo. 4, c. 16, s. 64, it is enacted, "that the commissioners shall, by deed indented and inrolled in any of his Majesty's courts of record, convey to the said assignees, for the benefit of the creditors as aforesaid, all lands, tenements, and hereditaments, except copy or customary hold in England, Scotland, Ireland, or in any the dominions, plantations, or colo-

nies belonging to his Majesty, to which any bankrupt is entitled, and all interest to which the said bankrupt is entitled, in any of such lands, tenements, or hereditaments, and of which he might, according to the laws of the several countries, dominions, plantations, or colonies have disposed, and all such lands, tenements, and hereditaments, as he shall purchase, or shall descend, be devised, revert to, or come to such bankrupt before he shall have obtained his certificate; and all deeds, papers, and writings respecting the same; and every such deed shall be valid against the bankrupt, and against all persons claiming under him." A proviso follows as to the registration of conveyances of colonial property.

And by sec. 65, it is enacted, "that the commissioners shall by deed indented and enrolled as aforesaid, make sale for the benefit of the creditors as aforesaid, of any lands, tenements, and hereditaments, situate either in England or Ireland, whereof the bankrupt is seised of any estate tail, in possession, reversion, or remainder, and whereof no reversion or remainder is in the crown, the gift or provision of the crown, and every such deed shall be good against the said bankrupt, and the issue of his body, and against all persons claiming under him after he became bankrupt, and against all persons whom the said bankrupt by fine, common recovery, or any other means, might cut off or debar from any remainder, reversion, or other interest, in or out of any of the said lands, tenements, and hereditaments."

And by sec. 68, it is enacted, "that the commissioners shall have power by deed indented and enrolled in any of his Majesty's courts of record, to make sale for the benefit of the creditors, of any copyhold, or customary hold lands, or of any interest to which any bankrupt is entitled therein, and thereby to entitle or authorise any person or persons on their behalf, to surrender the same for the purpose of any purchaser or purchasers being admitted thereto."

P. 511.—The court will refer it to the Master to take an account of the rents and profits of an estate received by the plaintiff, in possession by virtue of an *elegit*, and will order the plaintiff to give up possession, if it appears that all the monies due to him have been received. Price v. Varney, 3 B. and C. 733.

P. 535.—Stat 4 Geo. 2, c. 28. The title of the landlord proceeding under this statute, must be taken to have accrued on the day when the forfeiture would have accrued at common law, by non-payment of the rent. Doe d. Lawrence v. Shawcross, 3 B. and C. 752.

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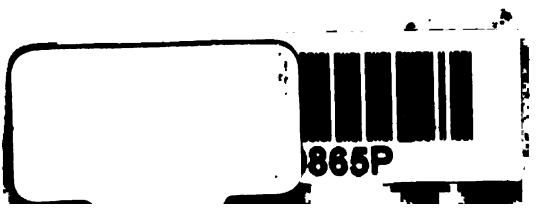
ERRATA.

Page 35, line 6, *for* " grantor," *read* " grantee."
55, last line, *for* " court," *read* " count."
98, note (*m*), *for* " *Rec*" *read* " *recit.*"
127, in the margin, *for* " *aliel*," *read* " *aiel.*"
131, dele note (*f*).
526, note (*b*), *for* " Wells," *read* " Watts."
532, note (*i*) *for* " Coe," *read* " Doe."
566, note (*g*), *for* " 540)," *read* " 538."

J. M'Creery, Tooks-court,
Chancery-lane, London.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